(1)

91-755

No. _____

Supreme Court, U.S.
FILED
NOV 4 1991
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

FRANK L WHITMER AND JOAN P WHITMER,
Petitioners

v

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R B HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H H ROBERTSON CO., H H ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H S NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L C KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Frank L Whitmer and Joan P Whitmer
American Citizens on their own behalf, Petitioners
221 Pardridge Place, DeKalb IL 60115, 815/758-7272
4 Nov 1991

LAWthority® Nov 1991

QUESTIONS PRESENTED

1. Whether the trial court erred in transferring a case between district divisions, when the court favored the defendants' 'convenience' instead of the health and life of the plaintiffs.

2. Whether a judicial decision by an administrative law judge that a party is totally disabled and unable to function in a division of the district, constitutes an absolute bar to transfer for *"convenience only"* to that forum.

3. Whether the federal district court can dismiss a case sua sponte *"for want of prosecution"* without notice, admonishment, or hearing.

4. Whether only six days to file a full brief on the merits by a non-attorney pro se plaintiff awaiting emergency exploratory and corrective surgery who has not violated any rules or been admonished, is a violation of due process, equal protection of the law and access to the courts.

5. Whether the intentional scheduling of conflicting dates resulting in the dismissal of an appeal is a violation of due process, equal protection of the law and access to the courts, when the court was advised of the conflicts.

6. Whether the ignoring of established court emergency procedures in a medical emergency is a violation of due process, equal protection of the law and access to the courts.

7. Whether urgent emergency medical care for a party, supported by sworn physician affidavits, can be delayed or denied by a court without a timely hearing.

8. Whether a party has any right to control another party's health care where it is alleged that they caused the injury and could gain from such control.

9. Whether a cause and an appeal can be dismissed by a court where the party was denied urgent medical care supported by physicians' sworn affidavits, and the denial of the medical care caused the procedural lapse leading to the dismissal, and no hearing was held.

LIST OF PARTIES

The parties are the same as those listed in the caption of this petition.

PETITIONERS

Frank L Whitmer and Joan P Whitmer are party-plaintiffs, non-attorneys pro se, private citizens representing themselves in a civil case.

Petitioners are individuals, citizens and residents of the Northern District of Illinois, Western Division, County of DeKalb and the State of Illinois. They are also owners of condominium unit 8504 in the John Hancock Center, 175 East Delaware Place (residential address), Chicago, Illinois.

Mr Whitmer was elected a member of its Board of Directors, additionally of its Executive Committee, and was also appointed Chairman of the Engineering Committee for the Condominium Association.

Employees, officers, and members of the Association complained to him about ventilation health and safety code violations. He investigated and opposed the violations. As a result, the City of Chicago prosecuted certain violations and won a trial on the merits, as well as additional agreed orders.

He was the Executive Director of a specialized, certifying international, national and local bar association for fifteen years. He was a participant in the American Bar Association *"Arden House Conferences."* He is a former management employee with American Law Reports.

Petitioner Frank L Whitmer has been adjudged seriously impaired by toxic pollutants during and following his residence in the John Hancock Center, and has consequently been under total disability.

LIST OF PARTIES

RESPONDENTS

John Hancock Mutual Life Insurance Co., Skidmore, Owings And Merrill, Sudler And Co., Sudler Marling, Inc., Tishman Construction Co., Aluminum Company of America, Admiral Heating and Ventilating, Inc., R B Hayward Co., Universal Sheet Metal Corp. d/b/a Universal-Hayward, Cupples Products Corporation, a Division of H H Robertson Co., H H Robertson Co., 175 East Delaware Place Homeowners Association, H S Nachman and Associates, Inc., Environmental Systems Design, Inc., L C Kohlman, Inc., General Parking Corporation, Wilson & McIlvaine, City of Chicago, and Does 1-50 Inclusive.

The respondents are companies, partnerships, corporations, a municipality, a homeowners association and a law firm.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	2
JURISDICTION AND STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	18
CONCLUSION	30
APPENDIX	A 1-22

TABLE OF AUTHORITIES

Application of Hvidsten,
72 NW2d 524, (ND) 20

Burden v Yates, 644 F2d 503
(CA 5, 1981) 25

Gonzalez v Firestone Tire & Rubber Co.,
610 F2d 241 (CA 7, 1980) 24

International Business Machine Corporation
v Edelstein, 526 F2d 37, 45 (1975) 22

Ken-Mar Airpark Inc v Toth Aircraft & Accessories
Co., 12 FRD 399 (DC MO 1952) 25

Marshall v Sielaff, 492 Fed 917 24

McGowan v Faulkner Concrete Pipe Co.,
659 F2d 554 (CA 5, 1981) 25

McLaren v F Byrd, Inc., 15 NE2d 993, 998,
296 Ill App 345 26

Thomas v Capital Sec Sev., Inc., 836 F 2d 866, 881
(5th Cir 1988) 21

United States v Utah Constr
& Mining Co., 384 US 394 at 422 (1966) 31

United States v Willard Tablet Co.,
141 F2d 141, (CA 7 Ind); 152 ALR 1194 20

STATUTES

28 USC § 1254	2
28 USC 1404(a)	19
29 USC 794, § 706(8)(B) Rehabilitation Act of 1973	21
42 USC section 405(g) (1982)	20
Illinois Code of Civil Procedure § 2-1009	8

CONSTITUTION

Fifth Amendment of the United States Constitution	all

OTHER AUTHORITIES

Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit, 1990 ed.	27, 29
United States Supreme Court Rule 10(a)	30

sc4nov1a

References to the record are:
A = Appendix page number
WD = Western Division docket,
ED = Eastern Division docket.

Petitioners Frank L and Joan P Whitmer respectfully ask that a writ of certiorari issue to review certain orders of the United States Court of Appeals and the United States District Court, Northern District of Illinois, western and eastern divisions.

Petitioners ask this Court to exercise its power of supervision. Alternatively, the Court should reverse summarily and remand with supervision to the court below, and require the district court to proceed in accordance with the law, for full hearing on the merits of the complaint with a proper case and trial.

The case should also be transferred from the eastern division to the western division in the Northern District of Illinois.

The United States Court of Appeals orders of June 7, May 10, May 2, April 25, (2), March 15, and January 25, 1991 December 20, 1990 and all other preceding, now effectively final orders in the circuit or district courts in that they led to these orders are sought to be reviewed.

In addition, certain orders of the Northern District of Illinois, Western Division, entered on April 12, 1989, October 2, and October 26, 1989, and of the Eastern Division entered on June 14-15.

Also the order of June 27, 1990 by the federal district court, eastern division, dismissing this cause for want of prosecution with prejudice as Petitioners did not appear for a status hearing. All other preceding, now effectively final orders, in that they led to this order are sought to be reviewed.

OPINIONS BELOW

The orders are not reported, certain ones are reproduced in the appendix. The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Western Division and the denial of certification have not been reported.

JURISDICTION and STATUTE INVOLVED

The order of the United States Court of Appeals for the Seventh Circuit entered on May 10, 1991 dismissed the appeal. The court of appeals denied a timely petition for rehearing on June 7, 1991.

Justice John Paul Stevens, on August 29, 1991, granted an extension of time to and including November 4, 1991 to file the petition for writ of certiorari, application A-151.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under:

28 USC § 1254(1) Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

Petitioners' Federal Complaint

The merits of the case have never been considered, there has been no trial on the merits, and petitioners have had no discovery whatsoever.

Petitioners use the extended term *"defendants"* under the concept of conspiracy, as petitioners have pled a continuing conspiracy in their complaint.

Plaintiffs brought this suit in the Northern District of Illinois, Western Division, invoking federal jurisdiction under the venue statutes and:

> the CONSTITUTION OF THE UNITED STATES, particularly the First, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Thirteenth, and Fourteenth Amendments,
>
> the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO"), 18 U.S.C. section 1961 et. seq., particularly 1964(a),(c), and 1965(a),(b),(c),(d),
> the CIVIL RIGHTS ACT, 42 U.S.C. section 1983 et. seq., particularly 1985(3), and 28 U.S.C. sections 1331, 1337, 1339, 1343, 1355, 1357, 1391 and 1395.
>
> Additionally, Defendants have deprived Plaintiffs of their rights, privileges and immunities under the CONSTITUTION OF THE STATE OF ILLINOIS, particularly Articles Six and Eleven and the Bill of Rights sections One, Two, Four, Twelve, Thirteen, Fifteen, Twenty-Three and Twenty-Four, and the STATUTES OF THE STATE OF ILLINOIS, and the MUNICIPAL CODE OF CHICAGO.

The district court had jurisdiction over the remaining non-federal counts as related pendent claims under State statutory and common law.

THE LITIGATION HISTORY
Of The John Hancock Center In Chicago
building code health and safety violations.

The John Hancock Center is a multi-use building. In addition to over 700 condominium apartments, there is a seven floor enclosed, indoor public parking garage, commercial areas, offices, restaurants, service and loading docks, a post office, and mechanical equipment.

Failed To Provide Natural Ventilation

During final construction, on both March 7, 1969, and again on January 14, 1970 architects Skidmore Owings & Merrill, owner John Hancock Mutual Life Insurance Company and Tishman Construction Company were cited by the City of Chicago for failure to provide natural ventilation for space used as living quarters. Five percent was required - but almost nothing was provided.

On February 3, 1970 John Hancock Mutual Life Insurance Company wrote *"We are aware that we are not conforming with the strict letter of the Chicago Building Code in regard to the hardware for the vent sections in the apartments . . . we request the indulgence of the Building Department in this matter and ask that they accept the vent sections as installed . . ."*

The City of Chicago advised John Hancock Mutual Life Insurance Company on February 18, 1970 that *"not be necessary to appear . . . as the matter has been adjudicated."* It was not adjudicated.

The mandatory minimum health requirements of the City of Chicago for the protection and promotion of the public health, safety and welfare were not enforced.

Turned Off Mechanical Ventilation

As Chairman of the condominium association's Engineering Committee, employees and condominium residents complained to petitioner that the mechanical ventilation systems were also being turned off through the night and causing health problems. The Association admitted turning off mechanical ventilation systems to save money, violating the code requirements.

Dangerous "Stack Effect"

There is an acknowledged and recognized *"stack effect"* in the Hancock Center. *"Most tall buildings are affected by the phenomenon of stack effect during the winter . . . Stack effect for the building [Hancock] finds its primary air source in the*

garage. Approximately 1000 cars use the garage daily. . . . (F W Boelter, PE, CIH and E A Monaco, ASHRAE paper, 1987, *Ventilation Modification in a Parking Structure.*)

Personal Injury From Toxic Fumes

On both August 31, and October 27, 1981, Petitioner was advised that automobile exhaust and carbon monoxide fumes in his apartment could be the cause of many or all of his health problems, that he was injured from the inadequately performing ventilation system through transmission of the pollution from the garage. He was advised to move out of the building until it was corrected. It has not been corrected.

Resulting Litigation

Petitioners' John Hancock Center home in Chicago turned into a nightmare and resulted in the following lawsuits:

Petitioner's Personal Injury

(1) 82 CH 7453, *Frank L Whitmer v Hancock* et al, Chancery Division, Circuit Court of Cook County, Illinois, his personal injury lawsuit. Filed August 1982.

Health And Safety Code Enforcement

(2) 83 M1 404279, *City of Chicago, Plaintiff and Joan P Whitmer, Plaintiff-Intervenor v John Hancock Mutual Life Insurance Company, Sudler & Company and Homeowners Association*, Circuit Court of Cook County, Illinois, Municipal Department, First District. Filed July 1983.

On March 7, 1984 during a partial trial the Illinois trial court judge stated: *"you may have an action against John Hancock or ever against the city for malfeasance."* (transcript page 185)

On May 2, 1984 he again repeated: *"may have an action against the city . . . may have an action against the builders."* (transcript page 21)

Petitioner's Intervention To Assure Enforcement

Petitioner Joan P Whitmer's intervened as a party-plaintiff as of right in the City of Chicago building department lawsuit

against John Hancock Mutual Life Insurance Company, Sudler & Company and the 175 East Delaware Place Homeowners Association.

After having filed the suit, the City of Chicago abandoned any aggressive attempts to enforce the building and health safety codes. The defendants' total defense was that the City of Chicago had approved the construction plans and violations and was thereby prohibited from enforcing the health and safety ordinances.

Petitioner Joan P Whitmer had finally been allowed to intervene as a plaintiff in the City suit through an appeal to the Illinois Appellate Court. The housing court finally ordered correction and the defendants also entered into agreed orders with the City to make changes in the monitoring and operation of the building to reduce the level and transmission of pollutants.

Mrs Whitmer's intervention required two appeals — both of which she has *"won."* However to this date all the defendants are still in default and no one has answered her complaint. A necessary clarification of her intervention is pending the rehearing of denial of certiorari in this Supreme Court of the United States, 90-1809.

Insurer And Defendant Contest Liability Coverage

(3) 84 L 52401 *Liberty Mutual Insurance Company v Aluminum Company of America,* Circuit Court of Cook County, Illinois, Law Division, and appeal 86-216, Appellate Court of Illinois, First District. A suit as to who would pay if petitioner Frank L Whitmer won an award in the stated *"underlying lawsuit 82 CH 7453."* Filed August 1984. Appealed January 1986. Decided March 1987.

Another Personal Injury Suit

(4) 86 L 12567 *Warner v Hancock et al.*, Circuit Court of Cook County, Illinois, Law Division. Another personal injury

suit against the same defendants as in Petitioners' federal lawsuit. Filed June, 1986.

Petitioners Refile In Federal Court

(5) 87 C 20306 (now 89 C 9341) *Whitmer v Hancock et al.*, Northern District of Illinois, ultimately Petitioners' joint federal lawsuit. Filed June, 1987.

Another Insurer And Defendant Contest Liability

(6) 88 CH 9050 *175 East Delaware Place Homeowners Association v Aetna Casualty & Surety Company*, Circuit Court of Cook County, Illinois, County Department, Chancery Division. Another suit between an insurer and a defendant in this case. Aetna had denied coverage and refused to defend in this case 87 C 20306 (now 89 C 9341). Filed October 1988.

Petitioners New Complaint For Obstruction Of Justice and Assault In A New Carbon Monoxide Poisoning

(7) 91 CV 3067 *Whitmer v Hancock et al* currently pending in the Northern District of Illinois. Filed May 1991.

"Settlement" Negotiations

On December 2, 1985, petitioners, when refusing a settlement in Chancery Court that did not comply with the minimum health and safety demands, asked *"correction of the building"* and *"revelation of what . . . exposed to."* The defendants stated in open court that the *"relief that's appropriate here turns out to be money."* (transcript, pages 17-19) Only money, but also coupled with the dropping of Mrs Whitmer's intervention and the dropping of the City of Chicago suit. Petitioners would not know the toxics they had been exposed to, and there would be no protection for the other occupants and their families.

Improper Withdraw Of Petitioners' Attorneys

Petitioners refusal to make such an unconscionable *"settlement"* resulted in their attorneys refusing to proceed, and abandoning them improperly. Petitioners had spent over one hundred thousand dollars in costs and fees in attempting to

get the John Hancock Center into full compliance with the health and safety codes of the City of Chicago.

The Federal Court Suit

Petitioners' federal complaint, filed in the United States District Court, Northern District, is in part a timely refiling of his voluntary dismissal of his state case under *Illinois Code of Civil Procedure* § 2-1009. (82 CH 7453, *F Whitmer v Hancock et al.* Circuit Court of Cook County, Illinois.)

Petitioners' complaint invokes federal jurisdiction under the special venue provision provided for the violation of the Racketeer Influenced and Corrupt Organizations Act and RICO conspiracy; claim against defendants under the civil rights act 42 USC § 1983, and 1983 conspiracy; civil conspiracy; fraud; fraudulent concealment; fraudulent concealment of a cause of action; consumer fraud; personal injury and negligence; implied warranty, nuisance; trespass and intentional infliction of emotional distress.

A Social Security Administrative Law Judge Had Found Petitioner To Be Totally Disabled

After careful consideration of the record as of July 16, 1984, an Administrative Law Judge determined in his nine page decision that:

"medical evidence supports the existence of a severe impairment . . . claimant is found to be disabled under the provisions of Title II of the Social Security Act commencing with January 1, 1983."

"It is the decision . . . claimant is entitled to . . . disability insurance benefits . . . condition . . . so severe as to not allow him to be exposed to routine work environments." (WD 213, ED 004)

The judgment of disability was reviewed and reconfirmed on Sep 30, 1987 by the Social Security Administration:

"reviewed . . . disability . . . your disability is continuing."

This Court can also take judicial notice that people, such as this petitioner, Frank L Whitmer, with cardiovascular and respiratory conditions are one of the specially protected classes under all of the Federal, State of Illinois, and City of Chicago pollution standards. They are advised to avoid any exposures exceeding the protective minimums.

Therefore, under the special venue provisions Petitioner sought a reasonable, and healthful litigation environment and filed his suit in the Western Division, as was his right.

Forced Back Into Same Environment
Physicians And His Disability Stated He Should Avoid

Petitioners now live in the Western Division. The venue provisions of RICO provide for venue against any person in any district in which he resides, is found, has an agent, or transacts his affairs. After considerable effort by the Petitioners, the Court and the defendants conceded that venue was proper in the Western Division. But defendants continued their efforts to transfer venue from Western to Eastern Division for their *"convenience."*

No Emergency Health Or Venue Discovery Allowed

Contrary to the district judge's statement, the court had refused Petitioner any discovery, stating that he would rule on venue, and nothing else. Petitioner's interrogatories and discovery motions just sat. Whenever Mr or Mrs Whitmer asked for information concerning their exposures on the demand of their physicians, all such information was denied to them by the defendants.

Defendants' False Statements Should Require Sanctions

In refusing to rule on anything except venue, defendants' tainted pleadings were accepted, despite plaintiffs' objections.

For example, defendants falsely claimed that petitioner and his wife were the only two people in the building claiming injury. But defendants knew all along of another personal injury case, 86 L 12567, *Joyce Warner v John Hancock Mutual*

Life Insurance Company, et al. They had been served with summons and their attorneys had withdrawn the entire court file in that case. They intentionally lied and the courts didn't seem to care to enforce the rules against false pleading.

Transfer To The Eastern Division

On October 2, 1989 the case was ordered transferred to the Eastern Division of the Northern District of Illinois, (Chicago, Illinois) for the *"convenience"* of the defendants, under 28 USC § 1404(a). The judge claimed *"de minimus (sic) inconvenience and hardship to plaintiffs."* (October 12, 1989 Memorandum Opinion and Order, page 7.)

Ignoring And Suppressing Of Petitioners' Uncontroverted Medical Support

His elaborate and inaccurate order never mentioned any of the missing medical documents, petitioner Frank L Whitmer's total disability, or plaintiffs' handicaps.

Without any controverting affidavits from the defendants, Judge Roszkowski and the magistrate unconstitutionally ignored the some twenty-seven affidavits, letters, and reports from Petitioner's five main physicians, other professionals and the Mayo Clinic.

That the uncontroverted medical affidavits and documentation provided the district court and that the injury to Frank L Whitmer's health, physical, financial and emotional state would be construed as *"very small, trifling or insignificant"* is highly prejudicial, and a total violation of Petitioners' constitutional rights to due process, equal protection, access to the courts . . . and most important, their right to life, liberty and health.

Denied Leave To File

There could be no hearings, evidentiary or otherwise for Petitioner Frank L Whitmer was denied leave to file anything more, without any cause or reason. (July 18, 1989 order, WD 284)

Missing Documents

But in preparing the record, Petitioners did file a renewal of their FRCP 60(a) motion on October 18, 1989. The court had done nothing about critical missing documents in the court files. These included physicians detailed and sworn affidavits and transcripts. On November 3, 1989, the judge's law clerk telephoned Petitioner Frank L Whitmer to ask which documents were missing from the court file and telephoned later stating that they had been found. However, this was after the court had ruled to transfer venue.

A New Carbon Monoxide Poisoning In The John Hancock Center

The Chicago municipal housing court finally ordered some corrections. Defendants entered into agreed orders with the City to make some changes in the monitoring and presumably the operation of the building to alleviate the pollution. The lead attorney for John Hancock described the new garage carbon monoxide monitoring equipment as follows:
"monitors will be in use from the alarm . . . thirty-five parts per million When the alarm sounds . . . the fans will then be turned on and the experience is the fans will quickly bring the level down to just a few parts per million."

Actual experience by Petitioner on May 17, 1989 proved that this system was either incompetent, intentionally disabled, inoperative, or malfunctioning that evening. Petitioner was dangerously and illegally exposed to non-automotive garage fumes and carbon monoxide levels violating all health standards in the indoor enclosed John Hancock Center public garage. The readings were taken and recorded by the Certified Industrial Hygienist doing the physical sampling and are part of the record. *Petitioner Frank L Whitmer was exposed to combustion fumes with levels of carbon monoxide as high as 65, 82, 141, 45, 50, 59, and 75 parts per million as has been fully documented for the Federal District Court.* (WD 276, Woodring affidavit)

Petitioner's request for time to recover was denied by the court. He was not only totally disabled, but had become legally disabled.

He had been transferred back into the very environment he escaped from years ago to protect his health, and that his total disability adjudication stated he should not be exposed to.

Petitioners Extremely Diligent

In spite of all this, Petitioners have been extremely diligent while ill, and handicapped, only asking that they be given meaningful due process.

United States District Court, Eastern Division

Three Month Delay To Hear Emergency Health Motion

On **March 12, 1990** the court was asked to stay the proceedings so that out-of-state medical evaluation and treatment could be scheduled for serious and disabling, cardiac, neurological and respiratory problems. The major presenting problems and risks were cardiovascular and respiratory, with the Mayo Clinic stressing that Petitioner's sleep apnea therapy must be reevaluated.

Petitioners also requested that personal presentation of the motion not be required, for the health reasons described in the motion, and that ruling be by mail.

Judge Nicholas J Bua had before him uncontroverted medical affidavits, letters and reports confirming why Mr Whitmer needed a critical immediate reassessment of his very severe sleep apnea, and that could only be done successfully in a fully equipped sleep disorders center. Mr Whitmer's health had continued to deteriorate without the proper specialized medical care asked for in the past.

Instead of acting promptly as an emergency, a briefing schedule was set, ordering the defendants to file their answers by March 30, 1990 and Petitioners to file replies in support of their motion on April 10th, 1990.

Assigned To Magistrate

Judge Nicholas J Bua referred all pending motions to Magistrate W T Rosemond Jr. On **June 4, 1990**, three months after the original motion for emergency health care, a status hearing was set for June 12, 1990.

This date conflicted with Petitioners filing of their petition for certiorari with the Supreme Court of the United States, due June 15. They badly needed the time to do legal research and finish their thirty page petition.

Petitioners filed emergency objections to the conflicting date and requested a ruling on their pending health motion for a stay of proceedings, stressing:

> *"Plaintiff's serious health emergency had also been clearly and objectively documented with affidavits and previously provided to this Court."*

Petitioners' motion for a change of date was denied. On June 12, 1990 the magistrate's constant theme and emphasis were — *"the case has got to move."* He declared that Petitioners' requests for time for medical care were *"moot."*

All relief was denied. Nineteen orders were entered. Petitioners were ordered to respond to 250 pages of twelve motions to dismiss and for summary judgment, to obtain any necessary discovery and to complete all medical treatment within ninety days.

Petitioners were plunged into a full briefing schedule, with no relief for Mr Whitmer's still unresolved medical problems - which were the reason for his original March 12, 1990 motion. Again his long neglected, and increasing medical problems were ignored, and the court insisted that the case progress regardless of the consequences to the Petitioners.

Petitioners had to divert crucial time from their June 15, 1990 Petition for Writ of Certiorari in order to object to the conflicting hearing, prepare a full motion, then prepare for the hearing, attend the two hour telephonic hearing, followed by preparing objections to the magistrate's decisions. These

demands added to Petitioner's already precarious ill health were the added straws that apparently finally broke him.

Mr Whitmer finally collapsed physically on June 15, 1990 and was fevered, confused, and exhausted after working through two nights and two days (even though feeling increasingly ill for months), to partially finish the Petition re Writ of Certiorari to the United States Supreme Court.

Petitioners' moved for time to object to the magistrate's 19 orders, supported by his physician's affidavit and a radiologist's report.

Petitioners' Case Dismissed

June 26, 1990 at a status hearing before Judge Nicholas J Bua:

> The Court: *Do you know where the plaintiff is?*
> Mr Marr: *. . . I don't. We were before Magistrate Rosemond approximately 14 days ago, and that status hearing was held with a speaker phone with Mr Whitmer on it and the attorneys in the magistrate's courtroom.*

Despite the magistrate's full briefing schedule set fourteen days earlier, the case was dismissed for want of prosecution as Petitioners were not present for this status hearing. *"Order cause dismissed for want of prosecution."* This dismissal was sua sponte, not on the defendants' motion.

Multiple Abdominal Perforations

On June 30, 1990, Mr Whitmer's physicians determined the presence of a distal antral pyloric ulcer, probably penetrating type.

Physician, Board Certified Internist, and Cardiologist William K Lee stated to the Federal District Court by his July 6, 1990 affidavit:

> *"In the past weeks he has developed a febrile illness in which no infectious disease process can be found. He has lost 24 lbs in addition to developing a significant amount of gastrointestinal symptoms with nausea, anorexia, dyspepsia and epigastric discomfort . . . and a distal antral pyloric*

ulcer. He requires further evaluation including gastroscopy to evaluate the pyloric ulcer to make sure there is no other disease processes in addition to an ERCP to evaluate his gallstones. . . . he is not a good candidate for any type of anesthesia or sedation which will be required for any endoscopy and/or surgery . . ."

"I strongly advise that he get an immediate evaluation . . . at the Mayo Clinic . . . Any further delay will have a catastrophic impact on his immediate and future health."

Petitioner was advised by his physicians that he was in danger of perforating unless attended to immediately. His physicians told him to go to the Mayo Clinic immediately for emergency health evaluations — that every day delayed risked his life.

These denials of a stay delayed Petitioner's emergency health treatment for almost seven months. He finally obtained a stay, and was able to go as an emergency patient to the *Mayo Clinic*, not because of his health emergency — *but only because he had filed a Petition for Writ of Certiorari to the United States Supreme Court!*

This denial of Petitioners' constitutional rights, as well as his inalienable rights to life itself, by the lower courts, was the very reason for that Petition for Writ of Certiorari to the United States Supreme Court and for his appeal to the United States Court of Appeals for the Seventh Circuit.

If proper and timely medical care and reassessment had been granted, Petitioner Frank L Whitmer's health problems could have been corrected or sufficiently reduced to cease being a problem. Instead it became a growing and deadly problem that Petitioners and their physicians could not correct without the court's help.

Petitioners appealed (90-2888) the unexpected, unwarranted dismissal of June 26, 1990 and all prior orders.

September 7, 1990. Petitioners sought time in the United States Court of Appeals for a 45 day medical emergency. Mr Whitmer's physicians estimated it would take at least 45 days for the emergency medical care and nominal recovery. But the Court added to Petitioners' burden by ordering that their brief and short appendix be filed at the end of the 45 days. That left no time for the medical emergency.

Another life-threatening abdominal perforation took place late September, 1990. All of the medical estimates and medical treatments had to be revised and substantially increased. It was as his physicians feared. Further emergency diagnostic testing at the Mayo Clinic October 6, 1990, found that the lack of timely necessary care had compounded the health crisis to where the Mayo Clinic had to advise *emergency exploratory and corrective surgery* for his gastrointestinal perforations. Petitioner again was required to request time, based on the estimates of his physicians.

October 23, 1990. At this point Petitioner had continued to perforate for over four months, from at least June 15, 1990. Add to this the time delay in the federal district court — seven months had passed since his original March 12, 1990 request.

On **October 25, 1990**. The Court of Appeals denied his physicians' request for at least 90 days for complicated emergency exploratory and corrective surgery for a continuing perforation condition. The court granted only 49 days to have surgery, recuperate, do legal research, and preparation of the brief, appendix and reply brief, leaving only a few days for the major surgery and an anticipated difficult recovery.

On **November 27, 1990** Petitioner had another life-threatening abdominal perforation. His glucose level elevated again.

December 14, 1990 motion.[1] Mr Whitmer was again forced to ask the court for time because of the November 27, 1990 medical determination that he was still perforating dangerously with a growing risk of infection.

January 7, 1991. Petitioners filed the eight page sworn medical affidavit of William K Lee in further support of their motion for a stay.

The Mayo Clinic's recent instructions include such strong terms as 'surgical exploration,' life threatening,' 'progressive infection,' 'or impossible to treat successfully if further delayed,' and *'imprudent to delay.'*

January 25, 1991 Order. Instead of prompt court action, thirty-nine days later Petitioners were ordered to file their brief in one month (by February 25, 1991) or their appeal would be dismissed. All other relief sought was denied, including his "Emergency Motion to Sanction and Strike the responses, to object, and for other relief."

Petitioners' emergency motion for emergency exploratory and corrective surgery with recuperation time was denied, in spite of it being requested by the Mayo Clinic and his local physician's affidavits.

After delaying immediate action on his motion, from December 17, 1990 to January 25, 1991, no time was provided for his emergency medical needs, with the court of appeals claiming a *de facto* time extension had been granted.

This again effectively prevented Petitioner from scheduling his emergency exploratory and corrective surgery with recuperation, until after the filing of his reply brief on April 10, 1991.

---

1 Petitioner's Emergency Motion for Stay of Proceedings and/or Time Extension to Obtain Petition for Certiorari and to Seek Emergency Medical Care" filed December 17, 1990.

Defendants Move For Dismissal Of The Appeal Claiming The Order Was Not Final

February 8, 1991. Prior to filing of the brief, in early February, 1991, defendants asked to stay the briefing on the merits pending resolution of the jurisdictional issues, and also moved to dismiss. However, their motions were false and misrepresented the jurisdictional matter completely. The court moved immediately on defendants' motions to stay the proceedings by granting it the same day it was filed.

March 15, 1991 Following the defendants' motions to dismiss based on lack of jurisdiction, the court did not give Petitioners an opportunity to refute defendants' false motions. as Petitioners had requested. Instead, the appeal was dismissed for lack of jurisdiction.

March 29, 1991. A Petition for Rehearing was timely filed pointing out defendants' falsities and 27 days later on April 25, 1991 it was granted. However, Petitioners were ordered to file their brief in only six working days on May 3, 1991. This was the same date as Mrs Whitmer's Supreme Court Petition for Writ of Certiorari. She had previously asked the court of appeals to not schedule anything on that date but they ignored her two requests, making properly filing impossible.

REASONS FOR GRANTING THE WRIT

DENIAL OF MEANINGFUL DUE PROCESS TO ADJUDICATED AND LEGALLY DISABLED, HANDICAPPED PRO SES

A massive violation of any concept of due process, equal protection, or access to the courts.

- **The courts ignored medical support and refused necessary time for health emergencies.**
- **The courts set dates which conflicted with U S Supreme Court filings.**
- **The courts ignored sanctions.**

- **The courts gave defendants opportunity to control emergency medical care.**
- **The courts did not require defendants to produce affidavits in support of their position.**
- **The courts ignored their own emergency procedures.**
- **The courts were "missing" key documents.**
- **The courts denied right to file.**

Medical Disability Opposition To Change Of Venue

The medical documents provided the court discussed specific harmful or disabling reactions, and that each plaintiff would be injured, disabled, severely and even fatally if they were forced to pursue their suit in Chicago. There were no controverting affidavits, there was no evidentiary hearing.

These critical medical documents were not used or *"balanced"* as required. Clearly this was an abuse of judicial power and discretion, certainly amounting to a direct suppression of evidence.

Social Security Administrative Law Judge's adjudication of total disability

Petitioners maintain that the instant the magistrate and the judge found and the defendants admitted that venue was proper in the Western Division, the Social Security Administration's Administrative Law Judge's adjudication was preclusive of any consideration of defendants' motions for transfer of venue for their "convenience" under 28 USC 1404(a) because Petitioner Frank L Whitmer was legally and is totally disabled in that he can no longer tolerate the pollutants to, from, and at the Eastern Division Court.

Petitioner Frank L Whitmer was found to be totally disabled at a hearing (not an initial application) by a Social Security Administration Administrative Law Judge effective January 1, 1983. This determination was based upon extensive documentation, including 22 exhibits, from the Mayo Clinic,

and a consulting examining physician for the Social Security Administration.

"Social Security Administration's findings of fact are conclusive if supported by substantial evidence." 42 USC section 405(g) (1982).

"The presumptions in favor of validity of judgments of a court and the jurisdiction of the court which may preclude collateral attack on such judgments may be given like effect in regard to administrative determinations."

"The decisions of an administrative body are, in the absence of evidence to the contrary, presumptively correct and valid. There is a presumption that legal duties and statutory requirements were complied with, that facts justifying a ruling were in existence, and that there was sufficient evidence on which to base the decision of the agency. So also, the action of an administrative agency, when done in the course of official duty, is generally presumed to have been done in good faith, and imports verity. Unappealed from orders must be assumed to be fair, just and reasonable, but the presumption in favor of an administrative decision is more potent with respect to finding of fact than it is with respect to a question of law." Application of Hvidsten, 72 NW2d 524, (ND).

"There is a privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." United States v Willard Tablet Co, 141 F2d 141, (CA 7 Ind); 152 ALR 1194.

Petitioner Frank L Whitmer has been diagnosed by such reputable medical organizations and their specialized physicians as the Mayo Clinic, Northwestern University Medical, and the DeKalb Clinic.

Rehabilitation Act Of 1973, 29 USC 701 et seq

Petitioner is diagnosed as hypertensive, with atrial disease, arrhythmia, severe obstructive and central system sleep apnea, peripheral neuropathy, and glucose intolerance—diabetes mellitus. Each qualify as a handicap under the provisions of the Rehabilitation Act of 1973. Each is sufficient to meet total disability criteria without the toxic exposures and consequent severe chemical susceptibility disorder that he charges defendants also caused. Further exposure would increase the above symptoms and reactions, many of which have a hypoxic component.

Both Petitioners Frank L and Joan P Whitmer are "*handicapped persons*" as defined by the Rehabilitation Act of 1973, 29 USC 794, § 706(8)(B) and are entitled to the protections of that Act in that they are not to be subjected to discrimination and harm or denial of their right to access to a reasonably healthful courtroom environment.

Plaintiffs Documented Motions For Sanctions And To Strike Were Never Ruled On

The trial court has acted upon tainted venue motions based upon false and misleading papers filed by defendants to Petitioners' detriment.

The trial court has refused to recognize the violation of Rules 11 or 12 as it was duty bound to do.

Rule 11 requires a court to impose sanctions, they are mandatory, but the trial and circuit courts have refused to do so. The Advisory Committee provided guidelines as to how it expected discretion would be exercised by the district judge in Rule 11:

> *"The time when sanctions are to be imposed rests in the discretion of the trial judge . . . in the case of motions at the time when the motion is decided or shortly thereafter."*

Sanctions should be imposed as closely as possible to the time when the offending conduct occurred. See *Thomas v Capital Sec Sev.*, Inc., 836 F 2d 866, 881 (5th Cir 1988).

Trial Court Controlling the Record

Judge Roszkowski constantly accused Petitioners of *"papering"* him. Petitioners suggested it took at least two pages to counter a single lie by the defendants and that stopping defendants' prejudicial falsifications would solve the problem.

The judge then instructed that nothing was to be filed without leave of court. Petitioners could not press their objections fully as their cause, and their appeal itself, was dependent upon the judge's good will and he refused to listen. *International Business Machine Corporation v Edelstein*, 526 F2d 37, 45 (1975) clearly established that preventing the making of a record for purposes of appeal was impermissible.

The Trial Court Erred In Dismissing This Case

The June 26, 1990 Dismissal

- is a harsh, severe, extreme sanction because this was a status hearing where a full briefing schedule had been set only fourteen days earlier by the Magistrate,
- the case had been active, with no pattern of indifference toward the case,
- nor a refusal or unreasonable failure to safeguard interests—in fact,
- plaintiff Frank L Whitmer was legally disabled during the period,
- plaintiffs conduct in the past has been diligent and proper, in spite of the severe health problems,
- defendants permitted to control health care of plaintiff F L Whitmer by setting a briefing schedule which prolonged and destroyed the ability to have immediate medical attention,
- plaintiffs had regularly asked that the court rule by mail and not require their personal presentation of their motions because of serious illness and the court was fully aware of his disabling and disablement,

- pro se's mistake is essentially an honest mistake or inadvertence of counsel.

Status Hearing Not Attended

There has been no balancing of interests in this dismissal order. In view of the special circumstances involved, it is a total denial of due process. The magistrate set some nineteen orders for briefing schedules on June 12, 1990, and denied all stays, including those for emergency health reasons, stating they were all moot because he had now set a briefing schedule.

The magistrate stated: *"Status hearing on all pending motions held."* (Docket entries ED 51 through 69.)

Magistrate W Thomas Rosemond stated that everything was before him. This was fourteen days prior to Judge Bua's status date. This alone defeats a claim of want of prosecution.

Yet this case was dismissed because of a three sentence order fourteen days later:

"Cause called for status hearing. Plaintiffs failed to appear."

"Order cause dismissed for want of prosecution."

The court had knowledge over the past year that Petitioner was seriously ill. Apparently defense counsel for six defendants also believed there would be no hearing on June 26, 1990.[2] With the exception of Admiral, all of the law firms for these *"no-show"* defendants are within five minutes from the federal district courthouse, not two and one-half hours away as Petitioners are travelling from DeKalb, yet Petitioner's have an almost perfect attendance record.

"Dismissal for lack of prosecution is harsh remedy and should be resorted to only in extreme cases since policy of

---

2 Not represented on June 26, 1990 were: Admiral Heating & Ventilating Inc., City of Chicago, Tishman Construction Company, Cupples Products Co./H H Robertson, and Aluminum Company of America. (Transcript of proceedings June 26, 1990.)

law favors hearing of claim upon merits." Marshall v Sielaff, 492 Fed 917.

"Dismissal with prejudice is severe sanction which will be reviewed according to standard that it is warranted only where there is clear record of delay or contumacious conduct by plaintiff and lesser sanction would not better serve interests of justice." Gonzalez v Firestone Tire & Rubber Co., 610 F2d 241 (CA 7, 1980).

The status call was not passed to the end of the call as a courtesy. No attempt was made by the court or anyone else to contact Petitioners by telephone to see if there was any valid reason for their absence. In fact, the court knew from Petitioners' previous motions, that they asked that the court not require personal presentation of their motions and asked the court rule by mail due to Petitioners serious health crises and other reasons.

Petitioners also consider the order void because during the time of Frank L Whitmer's defendant caused carbon monoxide poisoning and its consequences, he has been dissociated, visually impaired, cognitively impaired, and thereby legally disabled.

This drastic sudden, unexpected dismissal can be compared with the handling of a motion call made by a defendant earlier in the case. When the defendant didn't appear, the court passed it to the end of the call. The court then called it again, and when the defendant still didn't appear, the court then stated a telephone call would be made to the missing defendant to give him every chance to respond. The court later granted defendant's motion without any explanation or indication of any concern about defendant's failure to appear on behalf of their own motion for dismissal. This is manifestly inequitable when compared to the dismissal of Petitioners' case.

Petitioners' mistake is essentially an honest mistake or inadvertence, there is no pattern of indifference toward the case, nor a refusal or unreasonable failure to safeguard

interests—in fact, Petitioners conduct in the past has been far to the contrary—diligent, and proper, in spite of the severe health problems.

> *"The fact that defendant against whom default judgment had been entered had been ill and in bed for several days prior to and at the time the default judgment was entered, and that the illness prevented his appearance in court, was such 'excusable negligence' as to entitle defendant to an order setting aside the default judgment."* ***Ken-Mar Airpark Inc v Toth Aircraft & Accessories Co.***, 12 FRD 399 (DC MO 1952).

> *"Dismissal with prejudice under Rule 41(b) is warranted only where there exists a clear record of delay or contumacious conduct by plaintiff and lesser sanction would not better serve interests of justice."* *McGowan v Faulkner Concrete Pipe Co.*, 659 F2d 554 (CA 5, 1981).

> *"Court abused its discretion where lesser sanctions were not applied and dismissal would foreclose plaintiff from refiling because statute of limitations had run."* *Burden v Yates*, 644 F2d 503 (CA 5, 1981).

Certain statutes of limitations have run in this cause and therefore Petitioners are foreclosed from such refiling. This is indeed an abuse of due process.

The utter disdain of the Seventh Circuit Court of appeals toward Petitioners is evident in its January 25, 1991 order:

> *"While this court is sympathetic to appellant's medical concerns, the prolific filings presented to this court demonstrate that appellants are, in fact, capable of filing a brief."*

What Petitioners sought was time for emergency medical care, not the court's *"sympathy."*

Time Requested Either Ignored, Denied Or Insufficient Time To Be Usable Or Effective

This petition involves a continuous pattern of denial of Petitioners' emergency motions for stay of proceedings and/or time extension to seek emergency medical care. These motions have been denied over the life and death hea[illegible] objections and affidavits of the Petitioners and their physicians. It is important to note that although certain orders say *"granted,"* the relief requested was not granted. In most instances, the court required additional work, thereby invalidating the time needed for medical care.

Exceptional Circumstances Exist

Petitioners' emergency motion for emergency exploratory and corrective surgery required immediate action and should have been taken directly to the motions judge, or if necessary to a panel for immediate action.

Frank L Whitmer's physicians have clearly stated that it is an emergency calling for immediate action and that it is a matter of life or death for this patient. They have supported their statements with sworn affidavits warning of the fatal consequences.

The emergency motion more than fulfilled all the requirements in law and in legal procedure for an emergency—drastic negative consequences to the aggrieved party.

> *An "emergency" such as will relieve a person from use of same degree of self-possession, coolness, and judgment as would be required in absence of an emergency must be an imminent peril, and a perilous position caused by an agency beyond his control. McLaren v F Byrd, Inc.*, 15 NE2d 993, 998, 296 Ill App 345.

Mr Whitmer finally made two emergency medical trips to the Mayo Clinic in Rochester, Minnesota and is under constant medical care locally, but his exploratory and corrective surgery still remains to be done. The courts have denied him his right

to medical care. Mr Whitmer was, and continues to be, a walking open inch and one-quarter gastrointestinal wound.

Extraordinary circumstances which warranted a time extension by a reviewing court on the attorney's own affidavit, are described in *Islamic Republic of Iran v Boeing Co.*, 739 F2d 464, 465 CA 9 (1984). It certainly didn't even reach the life-threatening situation faced by this Petitioner.

> *"We conclude that illness of counsel entrusted with the filing responsibility may amount to extraordinary circumstances when the illness is so physically and mentally disabling that counsel is unable to file the appeal and is not reasonably capable of communicating to co-counsel his inability to file."*
>
> *"These conclusions are amply supported by counsel's sworn affidavit that his illness involved diarrhea, vomiting, and a five pound weight loss over 36 hours. During the same period of time, moreover, counsel's secretary was taken ill."*

Motions That May Require Immediate Action Were Not Given Immediate Attention

Instead of treating the Whitmers' December 17, 1990 motion as the emergency it was and promptly granting the necessary relief, the appeals court on its own motion ordered the defendants to respond by January 2, 1991.

The court ruled on January 25, 1991, certainly not in an emergency manner. Petitioner's medical care was delayed because of being placed in limbo, unable to properly schedule.

In view of the *"good cause shown,"* this was a serious abuse by the court.

This emergency motion was not treated as an emergency by the court. The *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit*, 1990 edition, clearly states in its Operating Procedures at 162:

> *"Motion Practice. Motions That May Require Immediate Action.* A staff attorney will read upon filing the following motions (whether labeled emergency or not):

(ix) all other emergency motions. If the motion requires immediate action, it will be taken to the motions judge and, if necessary a panel." (Emphasis added.)

Protest Of An Impossible Briefing Schedule

The January 25, 1991 order of the United States Court of Appeals for the Seventh Circuit order ignored the need for immediate surgery, offered "sympathy" instead of time, and ordered the brief filed in 30 days.

Following filing of the Circuit Rule 3(c) jurisdictional statement, the Seventh Circuit stayed the proceedings on the motion of defendants on February 8, 1991 pending its determination of the jurisdictional issue. (fifteen days remained of Petitioners' briefing schedule at that time).

Without an opportunity for Petitioners to be heard, this court dismissed the appeal on March 15, 1991 (on misrepresentations that the district court order was not final, ignoring that it was clearly pled as a FRCP 60(b) final order.)

Petitioners therefore filed a timely petition for rehearing on March 29, 1991.

The Seventh Circuit reinstated Petitioners appeal on April 25, 1991 as complying with the FRCP 60(b) requirements.

Prejudicial, Intentional Conflict In Filing Dates

However, the court also ordered the brief and short appendix to be filed on May 3, 1991. This prejudicially conflicted with the United States Supreme Court Petition for Certiorari due on the same May 3, 1991. Petitioners had notified the court of appeals of this date by personal delivery on April 22, 1991, prior to the court's action on April 25, 1991. This scheduling by the court of appeals gutted their appeal time of its most important hours and days— those following initial legal research, and preceding editing and printing.

This prejudicially short conflicting schedule did not even provide time for Petitioners to gain the protection of the rules for an oversized brief, FRAP 28(g). Petitioners were precluded from even applying for this because of the inordinate short

time period. May 3, 1991 was a Friday. It was a denial of due process that the due date was not extended to at least Monday, May 6, — almost doubling Petitioners' time.

USCA7 Has An Established Procedure For Denial Or Remand Of FRCP 60(b) Motions When Case Is Under Appeal

This United States Court of Appeals has a more effective, less troublesome and more equitable procedure than dismissal for FRCP 60(b) motions during appeal (or then dismissals of appeals) that is clearly laid out in its *Practitioners' Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit*. Petitioners followed the procedures as established but the United States Court of Appeals for the Seventh Circuit did not and again dismissed.

Protest Denial Of Protections Of Circuit's 'Established Procedures' For 14 Day Notice Of Rule To Show Cause

Due process requires notice and a hearing. Petitioners' appeal was dismissed without these protections. The court did not comply with its own Circuit Rule 31(c)(2) or page 54 of its own *Practitioner's Handbook*. They were not given the 14 day rule to show cause notice.

On April 25, 1991 the court referred to Circuit Rule 31(c)(2) in its order reinstating Petitioners' appeal after granting their petition for rehearing. However, no order to show cause was issued by the clerk following the physical inability of Petitioners to file their brief on its due date.

Denial of right to file

Petitioners were denied on June 7, 1991 the right to file additional papers, with the order stating: The Clerk of Court is directed to return, unfiled, all further pleadings offered by appellants in this appeal. So they (Petitioners) were denied remedy.

Petitioners are fully able to proceed if the conflicts between the court schedules are resolved, and they are given reasonable, uninterrupted, medical attention. They just can't be in four

courts that are active at the same time — and a clinic or hospital.

CONCLUSION

Petitioners respectfully ask that the Court to issue a writ of certiorari to the Court of Appeals for the Seventh Circuit, remanding the case for a full briefing on the merits.

Power of supervision

United States Supreme Court Rule 10(a) states:

"(a) When a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Petitioners ask this Court to exercise its power of supervision. They started the certiorari process with their petition for writ of certiorari 89-1984.

Alternatively, the Court should reverse summarily and remand with supervision to the court below, and require the district court to proceed in accordance with the law, for full hearing on the merits of the complaint with a proper case and trial.

The case should also be transferred from the eastern division to the western division in the Northern District of Illinois.

This Court should dispose of this matter as law and justice require.

Frank L Whitmer
Joan P Whitmer
American Citizens
on their own behalf
221 Pardridge Place
DeKalb IL 60115
815/758-7272

Frank L Whitmer

Joan P Whitmer

ORDERS

June 7, 1991 A3
Easterbrook, Manion, Kanne, Circuit Judges

May 10, 1991 A5
Easterbrook, Manion, Kanne, Circuit Judges

May 2, 1991 A7
Easterbrook, Circuit Judge

April 25, 1991 A8
Flaum, Easterbrook, Manion, Circuit Judges

April 25, 1991 A9
Easterbrook, Circuit Judge

March 15, 1991 A11
Flaum, Easterbrook, Manion, Circuit Judges

January 25, 1991 A13
Bauer, Chief Judge

December 20, 1990 A16
By the Court

June 27, 1990
Bua, District Judge A17

June 14-15, 1990
Rosemond Jr., Magistrate A18

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 7, 1991

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

No. 90-2888

FRANK L. WHITMER, et al., Plaintiffs-Appellants,	]	Appeal from the United States District Court for the Northern District of Illinois Eastern Division
v.	]	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Defendants-Appellees.	]	No. 89 C 8341 Judge Nicholas J Bua

This matter comes before the court for consideration of the following documents:

1. "APPELLEE SKIDMORE, OWINGS & MERRILL'S RESPONSE TO THE WHITMER'S MOTION FOR SANCTIONS" filed herein on June 4, 1991, by counsel for Appellee Skidmore, Owings & Merrill.

2. "PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING WITH SUGGESTION FOR

REHEARING IN BANC" filed herein on May 24, 1991, by the pro se appellants.

On consideration thereof,

IT IS ORDERED that APPELLEE SKIDMORE, OWINGS & MERRILL'S RESPONSE TO WHITMERS' MOTION FOR SANCTIONS is DENIED.

IT IS FURTHER ORDERED that appellants' Petition for Rehearing is DENIED. The court further reiterates that, to date, appellants have made no attempt to file a brief on appeal despite the numerous other filings they have offered. The Clerk of Court is directed to return, unfiled, all further pleadings offered by appellants in this appeal.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 10, 1991

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

No. 90-2888

FRANK L. WHITMER, et al., Plaintiffs-Appellants,	]	Appeal from the United States District Court for the Northern District of Illinois Eastern Division
v.	]	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Defendants-Appellees.	]	No. 89 C 8341 Judge Nicholas J Bua

This matter comes before the court for its consideration of the "APPELLANTS' EMERGENCY MOTION TO PLACE BRIEFING IN ABEYANCE PENDING RESOLUTION OF THE DISTRICT COURT'S ORDER PROCEEDING TO A MEMORANDUM OF ITS FRCP 60(b) INCLINATION" filed herein on May 6, 1991, by the pro se appellants. On consideration thereof,

IT IS ORDERED that the motion is DENIED.

On April 25, 1991, we ordered appellants to file their opening brief by May 3, 1991, or face dismissal of their appeal for want of prosecution. Since that order, appellants have filed two emergency motions to abate briefing; however, they have chosen not to file a brief. The brief in this case was originally due in October 1990. We have granted several extensions of time, none of which have produced a brief. Accordingly, this appeal is DISMISSED FOR WANT OF PROSECUTION.

United States Court of Appeals cg

For the Seventh Circuit
Chicago, Illinois 60604

May 2, 1991

Before Hon. FRANK H. EASTERBROOK, Circuit Judge

No. 90-2888

FRANK L. WHITMER, et al., Plaintiffs-Appellants,	]	Appeal from the United States District Court for the Northern District of Illinois Eastern Division
v.	]	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Defendants-Appellees.	]	No. 89 C 8341 Judge Nicholas J Bua

This matter comes before the court for its consideration of the "EMERGENCY MOTION to VACATE OR MODIFY PORTIONS OF APRIL 25, 1991 ORDER and for a FRCP 60(b) 'BRIEF POSTPONEMENT' UNDER THIS CIRCUIT'S 'ESTABLISHED PROCEDURES'" filed herein on April 30, 1991, by pro se appellants, Joan and Frank Whitmer. On consideration thereof,

IT IS ORDERED that said motion is DENIED. The opening brief of the appellants is due on May 3, 1991 as previously ordered. Failure to file a brief by that date will result in the dismissal of this appeal for failure to prosecute.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 25, 1991
[1 of 2 orders this date]

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

No. 90-2888

FRANK L. WHITMER, et al., Plaintiffs-Appellants	]	Appeal from the United States District Court for the Northern District of Illinois Eastern Division
v.	]	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Defendants-Appellees.	]	No. 89 C 8341 Judge Nicholas J Bua

This matter comes before the court for its consideration of the "PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING" filed herein on March 29, 1991, by the pro se plaintiffs-appellants. On consideration thereof,

IT IS ORDERED that PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING is GRANTED, our order of March 15, 1991 is VACATED and this appeal is

REINSTATED. The district court's order of June 26, 1990 dismissing appellants' complaint for want of prosecution was an appealable order. The motion to vacate that order, because it was filed more than ten days after the dismissal, was a motion under Federal Rule of Civil Procedure 60(b), and therefore, did not suspend the finality of the June 26th order. See Federal Rule of Appellate Procedure 4(a)(4).

However, our reinstatement of this appeal raises a secondary question as to whether this appeal should be dismissed for want of prosecution under Circuit Rule 31(c)(2). Although the court placed briefing in abeyance upon the filing of the motion to dismiss, see order of February 8, 1991, we had previously warned appellants in our order of January 25, 1991, that this case would be dismissed for failure to prosecute if appellants did not file their brief pursuant to that order. Accordingly,

IT IS FURTHER ORDERED that appellants file their opening brief and short appendix by May 3, 1991. Failure to so file will result in the dismissal of this case pursuant to Circuit Rule 31(c)(2).

United States Court of Appeals cg

For the Seventh Circuit
Chicago, Illinois 60604

April 25, 1991
[2nd of 2 orders this date]

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

FRANK L. WHITMER	]	Appeal from the
and JOAN P. WHITMER,	]	United States
Plaintiffs-Appellants	]	District Court
	]	Northern District of
	]	Illinois, Eastern
	]	Division:
No. 90-2888 v.	]	
	]	
JOHN HANCOCK	]	
MUTUAL LIFE	]	
INSURANCE COMPANY,	]	No. 89 C 8341
et al.,	]	Judge: Nicholas J Bua
Defendants-Appellees	]	District Court Judge

This matter comes before the court for its consideration of the " MOTION TO STAY OR DELAY PROCEEDINGS, ACTION OR DUE DATES UNTIL AFTER FILING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES, DUE ON MAY 3, 1991" filed herein by the pro se appellant (sic) Frank and Joan Whitmer. On consideration thereof,

IT IS ORDERED that said motion is DENIED. As previously ordered, the opening brief and appendix of the appellants is due by May 3, 1991.

United States Court of Appeals bj

For the Seventh Circuit
Chicago, Illinois 60604

March 15, 1991

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK. H. EASTERBROOK, Circuit Judge
Hon DANIEL A. MANION, Circuit Judge

FRANK L. WHITMER and JOAN P. WHITMER, Plaintiffs-Appellants	]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 90-2888 v	]	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, SKIDMORE, OWINGS & RRILL and SUDLER & COMPANY, et al, Defendants-Appellees	]	No. 89 C 8341 Judge Nicholas J. Bua ME

This matter comes before the court for its consideration of the:

1. "APPELLEE SKIDMORE, OWINGS & MERRILL'S CIRCUIT RULE 3(c) SUPPLEMENTAL JURISDICTIONAL STATEMENT AND MOTION

TO DISMISS" filed herein on February 8, 1991, by counsel for the Defendants-Appellees.

2. "SUPPLEMENTAL JURISDICTIONAL STATEMENT AND MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION" filed herein on February 12, 1991, by counsel for the Defendants-Appellees.

3. "PLAINTIFFS-APPELLANTS' MOTION FOR CONSOLIDATED RESPONSE to DEFENDANTS-APPELLEES' JURISDICTIONAL STATEMENTS AND RELATED MOTIONS" filed herein on February 15, 1991, for pro se, Appellants. On consideration thereof,

Appellants' motion to reinstate this case is still pending in the district court. Therefore, the district court's order dismissing the case is not yet final and appealable. *Rosner* (sic) *v. Chrysler Corp.*, 869 F.2d 1299, 1304-05 (7th Cir. 1988). Accordingly,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 25, 1991

Before
Hon. WILLIAM J. BAUER, Chief Judge

No. 90-2888

FRANK L. WHITMER, et al., Plaintiffs-Appellants	)	Appeal from the United States District Court for the Northern District of Illinois Eastern Division
vs.	)	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Defendants-Appellees	)	No. 89 C 8341 Judge Nicholas J Bua

This matter comes before the court for its consideration of the following documents:

1. "EMERGENCY MOTION FOR STAY OF PROCEEDINGS AND/OR TIME EXTENSION TO OBTAIN PETITION FOR CERTIORARI AND TO SEEK EMERGENCY MEDICAL CARE" filed herein on December 17, 1990, by pro se appellants.

2. "RESPONSE OF JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND SUDLER MARLING, INC., TO PLAINTIFFS-APPELLANTS'

THIRD 'EMERGENCY MOTION FOR STAY OF PROCEEDINGS AND/OR TIME EXTENSION [ETC.]" filed herein on January 2, 1991, by counsel for the appellees.

3. "MOTION OF THE DEFENDANT-APPELLEE, 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION TO ADOPT THE RESPONSE OF JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND SUDLER MARLING, INC., TO PLAINTIFFS-APPELLANTS' THIRD 'EMERGENCY MOTION FOR STAY OF PROCEEDINGS AND/OR TIME EXTENSION [ETC.]" filed herein on January 2, 1991, by counsel for the appellee.

4. "APPELLEE SKIDMORE, OWINGS & MERRILL'S RESPONSE TO PLAINTIFFS' EMERGENCY MOTION FOR STAY OF PROCEEDINGS" filed herein on January 2, 1991, by counsel for the appellee.

5. "DEFENDANT WILSON & MCILVAINE'S RESPONSE TO PLAINTIFFS' REQUEST FOR A STAY" filed herein on January 2, 1991 by counsel for the appellee.

6. "MOTION" filed herein on January 2, 1991 by counsel for General Parking Corporation.

7. "SUPPLEMENTAL EMERGENCY MOTION AND AFFIDAVIT FOR STAY OF PROCEEDINGS AND/OR TIME EXTENSION

1. TO SEEK EMERGENCY MEDICAL CARE
2. OBTAIN PETITION FOR CERTIORARI" filed herein on January 7, 1991 by appellants.

8. "EMERGENCY MOTION REQUESTING COURT HOLD RULING AND IN BANC REQUEST" filed herein on January 14, 1991, by pro se appellants.

9. "EMERGENCY MOTION TO SANCTION AND STRIKE DEFENDANTS-APPELLEE'S RESPONSES TO PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR STAY OF PROCEEDINGS AND/OR TIME EXTENSION (Filed December 14, 1990) TO OBJECT and for other relief" filed herein on January 23, 1991, by pro se appellants.

Appellants' brief was originally due October 10, 1990. However, this court has twice granted extensions totalling seventy-four days. In addition, this court has allowed appellant to supplement the current motion for extension of time resulting in another de facto extension of one month. While this court is sympathetic to appellant's medical concerns, the prolific filings presented to this court demonstrate that appellants are, in fact, capable of filing a brief. Accordingly, the appellants' brief shall be due on or before February 25, 1991. Failure to file the brief will result in this appeal being dismissed.

IT IS ORDERED that the brief of the appellees will be due by March 27, 1991, and the reply brief of the appellants, if any will be due by April 10, 1991.

IT IS FURTHER ORDERED that all other requested relief is hereby DENIED.

United States Court of Appeals MB

For the Seventh Circuit
Chicago, Illinois 60604

By the Court: December 20, 1990

No. 90-2888

FRANK L. WHITMER, et al., Plaintiffs-Appellants,	]	Appeal from the United States District Court for the Northern District of Illinois Eastern Division
v.	]	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Defendants-Appellees.	]	No. 89 C 8341 Judge Nicholas J Bua

NOTICE TO RESPOND

TO: All Counsel for the Appellees

A RESPONSE AND ORIGINAL AND THREE COPIES, WITH PROOF OF SERVICE) IS REQUIRED ON OR BEFORE January 2, 1991.

TO: "EMERGENCY MOTION FOR STAY OF PROCEEDINGS AND/OR TIME EXTENSION TO OBTAIN PETITION FOR CERTIORARI and TO SEE (sic) EMERGENCY MEDICAL CARE" filed herein on December 17, 1990, by the pro se appellants.

Minute Order

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Nicholas J Bua
Case Number 89 C 8341 June 26, 1990

FRANK WHITMER v. JOHN HANCOCK MUTUAL LIFE INSURANCE CO.

[Other docket entry:]

Cause called for status hearing. Plaintiffs failed to appear. Order cause dismissed for want of prosecution.

Docketing to mail notices.
courtroom deputy's initials: fda'
number of notices: 14 & MF
date docketed: June 27, 1990
docketing dpty initials: LG
date mld notices: June 27, 1990
mailing dpty initials: LG
document ED 70

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Docket entries: June 14-15, 1990 orders.
Magistrate W Thomas Rosemond Jr.
89C-8341. *Whitmer v Hancock et al.*]

06/14/90 docket ED 51 Minute order of 06/12/90: All stays entered in this case are hereby lifted. Rosemond, M. Mailed notice 06/14/90. KS

06/14/90 52 Minute order of 06/12/90: Status hearing on all pending motions held. Rosemond, M. Mailed notice 06/14/90. KS

06/14/90 docket ED 53 Minute order of 06/12/90: All defendants against whom the plaintiffs have filed a motion to compel must file their responses to the motion by July 16, 1990. Plaintiffs must file their reply brief by September 24, 1990. Rosemond, M. Mailed notice 6/14/90 KS

06/15/90 docket ED 54 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant John Hancock's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 55 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant R. B. Haywood (sic) Company's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 56 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant Tishman Construction Company's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 57 Minute order of 06/12/90. Over defendant's objections, plaintiffs are permitted to file a written response to defendant Wilson & McIlvaine's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 58 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant Aluminum Company of America's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 59 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant Admiral Heating & Ventilating's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 60 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant Cupples Products Corp. et al's motion to

dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 61 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant H. S Nachman & Associates et al motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90.

06/15/90 docket ED 62 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant General Parking Corporation's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 63 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant Skidmore, Owings & Merrill's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 64 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant City of Chicago's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response will result in the grant of

defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 65 Minute order of 06/12/90: Over defendant's objections, plaintiffs are permitted to file a written response to defendant 175 E. Delaware Place Homeowners Association's motion to dismiss and memorandum of law in support thereof by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that failure to file a response breief (sic) will result in the grant of defendant's motion. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 66 Minute order of 06/12/90: Over defendant L C Kohlman's objections, plaintiffs are permitted to file a written response to defendant's motion for summary judgment by September 24, 1990. Reply brief due by October 29, 1990. Plaintiffs are hereby warned that if they fail to file a response brief defendant's motion will be granted. Rosemond, M. Mailed notice 06/14/90. PG

06/15/90 docket ED 67 Minute order of 06/14/90: By telephone, in open court, plaintiff stated that he anticipates filing Rule 11 motions directed at those defendants who have filed motions to dismiss. Any and all Rule 11 motions filed by plaintiffs must be filed as separate motions directed against a specific defendant. Such motions may be filed concurrently with plaintiff's response to a particular motion to dismiss on or before Septemberr (sic) 24, 1990. Rosemond, M. Mailed notice 06/15/90. PG

06/15/90 docket ED 68 Minute order of 06/114/90: Regarding those defendants who have filed motions to dismiss accompanied by memorandum of law and who did not appear at the June 12, 1990, (sic), plaintiffs must file a response to these briefed motions to dismiss by September 24, 1990. Reply briefs due by October 29th, Rosemond, M. Mailed notice 06/15/90. PG.

06/15/90 docket ED 69 Minute order of 06/14/90: By telephone, in open court, plaintiff stated that he needed discovery to respond to L. C. Kohlman's summary judgment motion. Plaintiff may not file a discovery request in lieu of a response to L. C. Kohlman's summary judgment motion. See reverse side for more details. Rosemond, M. Mailed notice 06/15/90. PG.

Reverse side of minute order states:

Plaintiffs must file a Response to L. C. Kohlman's summary judgment motion by September 24, 1990. Additionally, plaintiffs may file a motion for discovery stating what discovery they believe necessary to adequately respond to Kohlman's summary judgment motion, and why such discovery is necessary. In any event, plaintiffs must respond to Kohlman's motion to the best of their ability. Plaintiffs are hereby warned that if they fail to file a Response to Kohlman's summary judgment motion, the motion will be granted.

So Ordered. Dated: (blank) /s/ W. Thomas Rosemond, Jr. United States Magistrate.

Supreme Court, U.S.
FILED
DEC 3 1991
OFFICE OF THE CLERK

(2)

No. 91-756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK L. WHITMER and JOAN P. WHITMER,
Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES P. DENARDO
Counsel of Record
RICHARD J. RETTBERG
CHRISTINE L. OLSON
McKENNA, STORER, ROWE, WHITE & FARRUG
200 N. LaSalle Street, Suite 3000
Chicago, Illinois 60601-1083
(312) 558-3900

Attorneys for JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, SUDLER AND COMPANY, n/k/a SUDLER MARLING, INC., and GENERAL PARKING CORPORATION

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

Whether there is a conflict among the U.S. Courts of Appeals on the question of whether a Court of Appeals is authorized to dismiss an appeal for want of prosecution due to an appellant's failure to timely file its brief, where all of the U.S. Courts of Appeals that have addressed this issue have held that such a dismissal is proper.

Whether the United States Court of Appeals for the Seventh Circuit properly followed its own Circuit Rule 31(c)(2) prior to dismissing the Petitioners' appeal for want of prosecution.

LIST OF PARTIES

Respondents John Hancock Mutual Life Insurance Company, Sudler and Company, n/k/a Sudler Marling, Inc., and General Parking Corporation are the same parties as those listed in the caption to the Petitioners' Petition.

Respondent John Hancock Mutual Life Insurance Company states, pursuant to U.S. Supreme Court Rule 29.1, that it has the following non-wholly owned subsidiaries:

John Hancock Services Internacionsis S/C Limitada

John Hancock International Services, S.A.

The Maritime Life Assurance Co.

John Hancock International Services (Hong Kong) Ltd.

Nahama & Weagant Energy Co.

P.T. Asuransi Pensiun Bumiputera John Hancock

AHP Acquisition Corp.

British American Life & General Insurance Berhad

K&N Kenanga SDN, Bhd.

First Signature Bank & Trust Co.

Energy Investors Management, Inc.

JHM Capital Corp.

Capital Growth (Bermuda) Mngmt. Co., Ltd.

John Hancock Advisers International, Ltd.

Sudler and Company, n/k/a Sudler Marling, Inc., and General Parking Corporation state that each has no parent company or subsidiary companies.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	3
STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
A. Procedural Background Of The Litigation	5
B. Issues Presented By The Petitioners Which Are Not Before This Honorable Court	7
REASONS FOR DENYING THE WRIT OF CERTIORARI	8
I. THERE IS NO CONFLICT AMONG THE U.S. COURTS OF APPEALS ON THE QUESTION OF WHETHER A COURT OF APPEALS CAN DISMISS AN APPEAL PURSUANT TO THE FEDERAL RULES OF APPELLATE PROCEDURE FOR AN APPELLANT'S FAILURE TO TIMELY FILE ITS BRIEF. ALL OF THE U.S. COURTS OF APPEALS WHICH HAVE ADDRESSED THIS ISSUE HAVE HELD THAT A COURT OF APPEALS IS AUTHORIZED TO DISMISS AN APPEAL FOR WANT OF PROSECUTION DUE TO AN APPELLANT'S FAILURE TO TIMELY FILE ITS BRIEF	9

II.

THE U.S COURT OF APPEALS FOR THE SEVENTH CIRCUIT FOLLOWED ITS OWN CIRCUIT RULE 31(c)(2) PRIOR TO DISMISSAL OF THE PETITIONERS' APPEAL 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases PAGE

Barber v. American Security Bank, 841 F.2d 1159 (D.C. Cir. 1988) 10

Davis v. Smith, 253 F.2d 286 (3d Cir. 1958) ... 10

Escobar-Ramos v. Immigration and Naturalization Service, 927 F.2d 482 (9th Cir. 1991) 11

Gilroy v. Erie Lackawanna Railroad Co., 421 F.2d 1321 (2d Cir. 1970) 10

Guam Sasaki Corp. v. Diana's, Inc., 881 F.2d 713 (9th Cir. 1989) 11

Instituto Nacional de Comercializacion Agricola v. Continental Illinois National Bank and Trust Co., 858 F.2d 1264 (7th Cir. 1988) 10, 12

Jackson v. Hensley, 484 F.2d 992 (5th Cir. 1973) . 10

Julien v. Zeringue, 864 F.2d 1572 (Fed. Cir. 1989) . 10

Larkin v. United Association of Journeyman, 338 F.2d 335 (1st Cir. 1964); *cert. denied*, 380 U.S. 975, 85 S.Ct. 1337 (1965) 10

Slack v. St. Louis County Government, 919 F.2d 98 (8th Cir. 1990) 11

Stotler & Co. v. Able, 837 F.2d 1425 (7th Cir. 1988) 10

Tidwell v. Dees, 464 F.2d 1297 (5th Cir. 1972) ... 10

Other Authorities

Federal Rule of Appellate Procedure 3(a) 4, 9

Federal Rule of Appellate Procedure 31(c) 4, 9

Circuit Rule 31(c)(2) 4, 8, 11, 12

No. 91-756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK L. WHITMER and JOAN P. WHITMER,

Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, John Hancock Mutual Life Insurance Company, Sudler and Company, n/k/a Sudler Marling, Inc., and General Parking Corporation, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Court of Appeals for the Seventh Circuit's two orders in this case. The Court of Appeals' orders: (1) dismissed for want of prosecution the Petitioners' appeal from an order of the U.S. District Court, Northern District of Illinois, Eastern Division, dismissing the Petitioners' action for want of prosecution; and (2) denied the Petitioners' petition for rehearing of that prior order.

OPINIONS BELOW

The Court of Appeals issued an order on May 10, 1991 dismissing for want of prosecution the Petitioners' appeal from the orders of the U.S. District Court, Northern District of Illinois, Eastern Division, dated June 26, 1990, March 14, 1990, April 16, 1990, August 3, 1990, June 6, 1990, and June 12, 1990 (Petitioners' Appendix 5-6). The Court of Appeals dismissed the Petitioners' appeal for want of prosecution pursuant to the court's prior order of April 25, 1991, in which the court ordered the Petitioners to file their brief by May 3, 1991 or face dismissal of their appeal.

The Court of Appeals issued a second order on June 7, 1991. This Order denied the Petitioners' Petition for Rehearing with Suggestion of Rehearing En Banc of the prior order of May 10, 1991 (Petitioners' Appendix 3-4). In this order, the Court of Appeals noted that the Petitioners had made no attempt to file a brief, despite their numerous other filings offered to the court.

The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated June 26, 1990, dismissed the Petitioners' cause of action for want of prosecution (Petitioners' Appendix 17). The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated August 3, 1990, referred the Petitioners' motion to vacate to a magistrate. The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated June 12, 1990, lifted all stays entered in the case and set forth briefing schedules. The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated June 6, 1990, denied

the Petitioners' emergency objection to a status hearing request for ruling on pending motion for stay of proceedings. The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated April 18, 1991, referred the case to a magistrate. The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated March 14, 1990, set forth a briefing schedule on the Petitioners' motion for stay of proceedings.

None of the Court of Appeals' or District Court's orders are reported.

JURISDICTION

The order of the Court of Appeals was entered on May 10, 1991. Rehearing was denied on June 7, 1991. On August 28, 1991, the Petitioners obtained an extension of time until November 4, 1991 in which to file a Petition for Writ of Certiorari. The Petitioners filed their Petition on November 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 3. Appeal as of Right—How Taken.

> (a) *Filing the Notice of Appeal.* An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . .

Federal Rule of Appellate Procedure 31. Filing and Service of Briefs. . . .

> (c) *Consequence of Failure to File Briefs.* If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. . . .

Circuit Rule 31. Filing of Briefs and Failure to Timely File Briefs. . . .

> (c) *Failure of Appellant to File Brief.* When an appellant's original brief is not filed when it is due, the procedure shall be as follows: . . .
>
> (2) *All Other Cases.* The clerk shall enter an order directing counsel, or a pro se appellant, to show cause why the appeal should not be dismissed. The court will then take appropriate action. . . .

STATEMENT OF THE CASE

A. Procedural Background Of The Litigation.

On August 24, 1990, the Petitioners filed their Notice of Joint Appeal to the U.S. Court of Appeals for the Seventh Circuit from the order entered by the U.S. District Court on June 27, 1990 dismissing the Petitioners' case for want of prosecution. The Petitioners had obtained an extension of time on July 18, 1990 in which to file their Notice of Joint Appeal, until August 24, 1990. The U.S. Court of Appeals for the Seventh Circuit had jurisdiction over this appeal pursuant to 28 U.S.C. §1291. This appeal was docketed in the U.S. Court of Appeals for the Seventh Circuit on August 28, 1990 under case no. 90-2888. The Seventh Circuit, on September 11, 1990, set forth a briefing schedule and set a due date for the Petitioners' appellants' brief on or before October 26, 1990.

On October 24, 1990, the Petitioners filed a motion to extend the time in which to file their appellants' brief. The Seventh Circuit granted this motion and ordered the appellants' brief to be filed on December 14, 1990.

On December 17, 1990, the Petitioner Frank L. Whitmer filed a motion for stay of proceedings or a time extension to obtain [sic] a petition for certiorari or to seek emergency medical care. On January 7, 1991, both Petitioners filed a supplemental emergency motion seeking the same relief. On January 10, 1991, the Seventh Circuit granted this second motion for extension and entered an order ordering briefing to be held in abeyance pending ruling on the Petitioners' motion for stay. On January 14, 1991, the Petitioners filed an emergency motion to hold ruling on their pending motion to stay until or after January

21, 1991. On January 23, 1991, the Petitioners filed an emergency motion to sanction and strike the Defendants-Appellees' responses to the Petitioners' emergency motion for stay of proceedings and/or time extension.

On January 25, 1991, the Seventh Circuit entered an order denying the Petitioners' motion for sanctions and motions for stay. The order further noted that the Petitioners' brief was originally due on October 10, 1990. The Seventh Circuit also, in its order, set forth a second briefing schedule and ordered that the Petitioners' brief be filed on or before February 25, 1991.

On February 8, 1991, one of the Respondents, Skidmore, Owings and Merrill, filed a motion to dismiss the case for lack of jurisdiction. On February 8, 1991, the Seventh Circuit issued an order holding briefing in abeyance and on March 15, 1991, the Seventh Circuit entered an order dismissing the appeal for lack of jurisdiction. On March 29, 1991 the Petitioners filed a petition for rehearing of this order. On April 22, 1991, the Petitioners filed a motion to stay or delay proceedings and due dates until after their filing of a Petition for Writ of Certiorari in a different case which was due on May 3, 1991. On April 25, 1991, the Seventh Circuit entered an order vacating the prior dismissal order and reinstating the appeal. The Seventh Circuit further ordered that the Petitioners file their brief by May 3, 1991. The order also provided that the Petitioners' failure to do so would result in the dismissal of the case pursuant to Circuit Rule 31(c)(2). Also on April 25, 1991, the Seventh Circuit issued an order denying the motion for stay or delay of proceedings and ordered the opening brief to be filed on May 3, 1991.

On April 30, 1991, the Petitioners filed a motion to amend portions of the April 25, 1991 order and for a brief

postponement. On May 2, 1991, the Seventh Circuit issued an order denying this motion and again ordered the Petitioners to file their brief on May 3, 1991. The order further provided that failure to file a brief by that date would result in dismissal of the appeal for want of prosecution.

On May 6, 1991, the Petitioners filed a motion to hold briefing in abeyance pending resolution of the District Court's order regarding the Petitioners' motion for statement or memorandum of the District Court's inclination to grant relief under Federal Rule of Civil Procedure 60(b). On May 10, 1991, the Seventh Circuit issued an order denying this emergency motion. The order also provided that the Petitioners' appeal was dismissed for want of prosecution due to the Petitioners' failure to file their brief by May 3, 1991.

On May 24, 1991, the Petitioners filed a Petition for Rehearing with Suggestion for Rehearing En Banc. On May 28, 1991, the Petitioners filed a motion for sanctions. On June 7, 1991, the Seventh Circuit issued an order denying the Petitioners' Petition for Rehearing. On June 13, 1991, the Seventh Circuit issued an order denying the Petitioners' motion for sanctions.

B. Issues Presented By The Petitioners Which Are Not Before This Honorable Court.

The Petitioners' "Questions Presented" section of their Petition lists nine questions, only five of which, Questions number 4 through 7 and Question number 9, are arguably before this Court. The only issues arising from the U.S. Court of Appeals for the Seventh Circuit's orders are: (1) whether the Court of Appeals properly dismissed the Petitioners' appeal for want of prosecution due to the Petitioners' failure to timely file their appellants' brief, and

(2) whether the Court of Appeals complied with its own Circuit Rule 31(c)(2) before dismissing the Petitioners' appeal.

The other questions presented by the Petitioners are not addressed by the Court of Appeals' orders and are, therefore, not before this Court. In addition, Question number 8 is unintelligible.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petitioners argue many points, only two of which are before this Court and none of which approach the kind of important constitutional or policy question which this Court should exercise its discretion to hear. Furthermore, the only issues before this Court, whether the Court of Appeals properly dismissed the Petitioners' appeal for want of prosecution and followed its own Circuit Rule prior to dismissal, do not present issues which involve a conflict in the decisions of the U.S. Courts of Appeals.

I.

THERE IS NO CONFLICT AMONG THE U.S. COURTS OF APPEALS ON THE QUESTION OF WHETHER A COURT OF APPEALS CAN DISMISS AN APPEAL PURSUANT TO THE FEDERAL RULES OF APPELLATE PROCEDURE FOR AN APPELLANT'S FAILURE TO TIMELY FILE ITS BRIEF. ALL OF THE U.S. COURTS OF APPEALS WHICH HAVE ADDRESSED THIS ISSUE HAVE HELD THAT A COURT OF APPEALS IS AUTHORIZED TO DISMISS AN APPEAL FOR WANT OF PROSECUTION DUE TO AN APPELLANT'S FAILURE TO TIMELY FILE ITS BRIEF.

A review of the decisions of the U.S. Courts of Appeals which have addressed the issue, the Courts of Appeals for the District of Columbia, First, Second, Third, Fifth, Seventh, Eighth and Ninth Circuits, shows that all have held that a Court of Appeals is authorized to dismiss an appeal for want of prosecution. Since there is no conflict among the Courts of Appeals on this issue, therefore, there is no basis for this Honorable Court to exercise its judicial discretion under Supreme Court Rule 10. Therefore, this Honorable Court should deny the Petitioners' Petition for Writ of Certiorari.

Federal Rule of Appellate Procedure 3(a) provides that failure of an appellant to take any step other than the timely filing of a notice of appeal is a ground for such action as the Court of Appeals deems appropriate, which may include dismissal of the appeal. Federal Rule of Appellate Procedure 31(c) provides that if an appellant fails to file a brief within the time provided by the rule or within the time as extended, an appellee may move for dismissal of an appeal. The particular U.S. Courts of Appeals and their holdings on the issue of whether a Court of Appeals is authorized to dismiss an appeal are set forth below:

D.C. Circuit: *Barber v. American Security Bank*, 841 F.2d 1159, 1162 (D.C. Cir. 1988) (counsel's failure to file his brief on time and failure to file the proper motions warranted dismissal). *See also Julien v. Zeringue*, 864 F.2d 1572, 1575 (Fed.Cir. 1989) (failure to comply with the court's rules, including requirements for preparing and filing of briefs, appendices and other papers, may result in dismissal for failure to prosecute).

First Circuit: *See Larkin v. United Association of Journeyman*, 338 F.2d 335, 336 (1st Cir. 1964); *cert. denied*, 380 U.S. 975, 85 S.Ct. 1337 (1965) (appeal dismissed for want of prosecution due to *pro se* appellant's failure to file adequate brief).

Second Circuit: *Gilroy v. Erie Lackawanna Railroad Co.*, 421 F.2d 1321, 1323 (2d Cir. 1970) (court sanctioned appellant for failing to prosecute appeal and directed the clerk to dismiss the appeal if the appellant failed to docket the record and file the brief and appendix within 30 days).

Third Circuit: *Davis v. Smith*, 253 F.2d 286, 288 (3d Cir. 1958) (appellant's failure to take any steps to prosecute an appeal including filing a brief warranted dismissal of that appeal).

Fifth Circuit: *Tidwell v. Dees*, 464 F.2d 1297, 1298 (5th Cir. 1972) (dismissal of a *pro se* appeal pursuant to Federal Rule of Appellate Procedure 31 due to the appellant's failure to file a brief). *See also Jackson v. Hensley*, 484 F.2d 992 (5th Cir. 1973).

Seventh Circuit: *Stotler & Co. v. Able*, 837 F.2d 1425, 1427-1428 (7th Cir. 1988) (appeal dismissed pursuant to Federal Rule of Appellate Procedure 31 due to the appellant's failure to file a timely brief). *See also Instituto Nacional de Comercializacion Agricola v. Continental Illinois National Bank and Trust Co.*, 858 F.2d 1264 (7th Cir. 1988).

Eighth Circuit: *See Slack v. St. Louis County Government*, 919 F.2d 98, 99-100 (8th Cir. 1990) (dismissal of appellant's appeal due to appellant's brief not being in compliance with the Federal Rules of Appellate Procedure).

Ninth Circuit: *Escobar-Ramos v. Immigration and Naturalization Service*, 927 F.2d 482, 485 (9th Cir. 1991) (Federal Rule of Appellate Procedure 31 provides for appellee moving to dismiss an appeal if an appellant fails to file a brief). *See also Guam Sasaki Corp. v. Diana's, Inc.*, 881 F.2d 713 (9th Cir. 1989).

There is no conflict among the U.S. Courts of Appeals that a Court of Appeals is authorized to dismiss an appeal for want of prosecution. In addition, in the instant case, the Petitioners' appellants' brief was originally due to be filed on October 26, 1991. The Seventh Circuit granted the Petitioners two extensions of time in which to file their Brief and also held briefing in abeyance twice. The Seventh Circuit then reset the due date for the appellants' brief, after reinstating the Petitioners' appeal, to May 3, 1991, which was more than six months after the Petitioners were originally required to file their appellants' brief. The Petitioners were given ample time in which to prosecute their appeal and the Seventh Circuit was authorized to dismiss the Petitioners' appeal for want of prosecution.

II.

THE U.S COURT OF APPEALS FOR THE SEVENTH CIRCUIT FOLLOWED ITS OWN CIRCUIT RULE 31(c)(2) PRIOR TO DISMISSAL OF THE PETITIONERS' APPEAL.

The U.S. Court of Appeals for the Seventh Circuit's Circuit Rule 31(c)(2) provides that when an appellant's original brief is not filed when due, the clerk shall enter an

order directing counsel or a *pro se* appellant to show cause why the appeal should not be dismissed. The court will then take the appropriate action after entry of such an order. Contrary to the Petitioners' argument, the U.S. Court of Appeals for the Seventh Circuit followed its own procedure prior to dismissal of the Petitioners' appeal. The Seventh Circuit's order dated April 25, 1991 stated as follows:

> "It is further ordered that appellants file their opening brief and short appendix by 5/3/91. *Failure to do so will result in the dismissal of this case pursuant to C.R. 31(c)(2)*" (emphasis added).

The Seventh Circuit entered a second order on May 2, 1991, indicating that failure of the Petitioners to file a brief by May 3, 1991 would result in dismissal of the appeal for failure to prosecute. The Seventh Circuit did not enter its dismissal order until May 10, 1991.

In addition, even assuming that the Court of Appeals did not follow its own procedure as set forth in Circuit Rule 31(c)(2), this is irrelevant. The Petitioners were given ample warning on more than one occasion that their appeal would be dismissed for want of prosecution if they failed to timely file their appellants' brief. *See Instituto Nacional v. Bell*, *supra*, wherein the court held it was immaterial that the clerk did not enter an order to show cause when an appellee failed to file its brief. *Instituto Nacional*, *supra*, 858 F.2d at 1271.

CONCLUSION

The only issues before this Honorable Court are: (1) whether there is a conflict among the U.S. Courts of Appeals on the issue of whether a Court of Appeals is authorized to dismiss an appeal for want of prosecution pursuant to the Federal Rules of Appellate Procedure and (2) whether the U.S. Court of Appeals for the Seventh Circuit followed its own Circuit Rule. There is no conflict among the U.S. Courts of Appeals on these issues. The issues raised by the Petitioners are plainly without merit. The Petition should be denied forthwith.

Respectfully submitted,

JAMES P. DENARDO
Counsel of Record
RICHARD J. RETTBERG
CHRISTINE L. OLSON
McKENNA, STORER, ROWE,
WHITE & FARRUG
200 N. LaSalle Street, Suite 3000
Chicago, Illinois 60601-1083
(312) 558-3300

Attorneys for JOHN HANCOCK
MUTUAL LIFE INSURANCE COMPANY,
SUDLER AND COMPANY,
n/k/a SUDLER MARLING, INC.,
and GENERAL PARKING CORPORATION

Dated: December, 1991

FILED
DEC 4 1991
OFFICE OF THE CLERK

(3)

No. 91-756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK L. WHITMER and JOAN P. WHITMER,

Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LEONARD S. SHIFFLETT
Counsel of Record
CARRIE A. DURKIN
BURKE, WILSON & McILVAINE
500 West Madison Street
Suite 3700
Chicago, Illinois 60661
(312) 715-5000

Attorneys for Respondent
WILSON & MCILVAINE

QUESTION FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit has the authority to dismiss appellants' case for failure to comply with court orders.

TABLE OF CONTENTS

	PAGE
QUESTIONS FOR REVIEW	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
A. THE ONLY ISSUE BEFORE THIS COURT IS THE APPELLATE COURT'S DISMISSAL OF PETITIONERS' APPEAL FOR WANT OF PROSECUTION	3
B. THE APPELLATE COURT'S DISMISSAL OF PETITIONERS' APPEAL WAS PROPER	5
C. THE ISSUE RAISED BY PETITIONERS IS NOT SUFFICIENTLY IMPORTANT TO REQUIRE REVIEW BY THE SUPREME COURT	10
CONCLUSION	11

TABLE OF AUTHORITIES

CASES:	PAGE
Barber v. American Sec. Bank, 841 F.2d 1159 (D.C. Cir. 1988)	6
California v. Taylor, 353 U.S. 553 (1957)	4
Duignan v. United States, 274 U.S. 195 (1927)	4
E.E.O.C. v. Federal Labor Relations Authority, 476 U.S. 19 (1986)	4
Guam Sasaki Corp. v. Diana's Inc., 881 F.2d 713 (9th Cir. 1989)	5
Instituto Nacional v. Continental Illinois Nat'l. Bank, 858 F.2d 1264 (7th Cir. 1988)	9
Julien v. Zenringue, 864 F.2d 1572 (Fed. Cir. La. 1989)	6
Link v. Wabash R.R., 370 U.S. 626 (1962)	5
Patrick v. Burget, 486 U.S. 94, *rehearing denied*, 487 U.S. 1243, *on remand*, 852 F.2d 1241 (1988)	4
Stotler and Co. v. Able, 837 F.2d 1425 (7th Cir. 1988)	6, 8, 9
Thermocycle Int'l. Inc. v. A.F. Hinrichsen Sales Corp., 851 F.2d 339 (Fed. Cir. 1988)	6
Youakim v. Miller, 425 U.S. 231 (1976) (per curiam); *on remand* 431 F. Supp. 40, *affirmed*, 562 F.2d 483, *probable jurisdiction noted*, 434 U.S. 1060, *affirmed*, 440 U.S. 125	4

STATUTES:

28 U.S.C. § 1254 (1988) 3, 4

RULES:

Circuit Rules For The U.S. Court Of Appeals For The Seventh Circuit (1991), Rule 31(c)(2) ... 7, 8, 9

Circuit Rules For The U.S. Court Of Appeals For The Seventh Circuit (1991), Rule 31(d) 9

United States Supreme Court Rule 10 (1990) 10

No. 91-756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK L. WHITMER and JOAN P. WHITMER,

Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE,* CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

---

* Wilson & McIlvaine has no subsidiaries or parent companies.

STATEMENT OF THE CASE [1]

On August 24, 1990, petitioners Joan P. Whitmer and Frank L. Whitmer ("petitioners") appealed the district court's dismissal of their case for want of prosecution to the United States Court of Appeals for the Seventh Circuit ("Appellate Court"). The appeal was never briefed on the merits.

On September 10, 1990, petitioners filed a motion for extension of time to file their brief, which the Appellate Court granted, extending the due date. On October 26, 1990, petitioners filed a second motion for extension of time to file their brief, which the Appellate Court granted, extending the due date to December 14. On December 14, 1990, petitioners filed a third "emergency" motion for extension of time to file their brief, followed by a fourth "supplementary" motion on January 7, 1991.

On January 10, 1991, the Appellate Court, on its own motion, stayed briefing until it resolved the pending motions for extension of time. On January 25, 1991, the Appellate Court ordered petitioners to file their brief by February 25, specifically directing that the appeal would be dismissed if petitioners failed to comply. *See* Petitioners' brief at A13.

On February 8, 1991, certain of the defendants moved to dismiss the appeal on jurisdictional grounds. The Appel-

[1] Petitioners' statement of the case omits and mischaracterizes much of the procedural history in this action and is replete with allegations that have no basis in the record. Therefore, respondent presents this Court with a short summary of the history of the case.

late Court ordered briefing stayed pending a ruling on those defendants' motions to dismiss. On March 15, 1991, the Appellate Court granted the motions to dismiss.

On April 22, 1991, petitioners requested a fifth extension of time to delay all due dates until after a brief was due in another action involving petitioners. On April 25, 1991, the Appellate Court reinstated the appeal, and ordered petitioners to file their brief by May 3, 1991, stating for a second time that a failure to do so would result in dismissal of the appeal. *See* Petitioners' brief at A8.

On April 29, 1991, petitioners requested a sixth extension of time, which the Appellate Court denied, stating for a third time that failure to file a brief as ordered would result in dismissal of the appeal. *See* Petitioners' brief at A7. On May 4, 1991, one day after petitioners' brief was due, petitioners requested a seventh extension of time.

On May 10, 1991, petitioners still had not filed their brief. The Appellate Court denied the pending request for an extension of time and dismissed petitioners' appeal for want of prosecution. *See* Petitioners' brief at A5. After several more motions from the petitioners, the Appellate Court directed the clerk of the court not to accept any more filings from petitioners on that appeal. After obtaining an extension of time from this Court, petitioners filed their Petition for Writ of Certiorari on Nov. 4, 1991.

SUMMARY OF ARGUMENT

The only issue before this Court is the propriety of the Appellate Court's dismissal of petitioners' appeal for want of prosecution. The Appellate Court granted a number of extensions over an eight month period. Petitioners were given ample opportunity to file a brief and were warned that failure to file a brief would result in dismissal. The Appellate Court's dismissal was proper in light of the circumstances of this case. Additionally, petitioners have not presented this Court with a significant legal issue requiring review. Therefore, this Court should deny the Petition.

ARGUMENT

A. THE ONLY ISSUE BEFORE THIS COURT IS THE APPELLATE COURT'S DISMISSAL OF PETITIONERS' APPEAL FOR WANT OF PROSECUTION.

Petitioners raise a myriad of issues and "questions presented" which are not properly before this Court on the Petition for Certiorari. The only question before this Court is the propriety of the dismissal of petitioners' appeal.

The jurisdiction of this Court to review the Appellate Court's dismissal of petitioners' appeal is invoked under 28 U.S.C. § 1254 (1988). That section provides in relevant part:

> Cases *in the courts of appeals* may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party . . . . [emphasis added]

28 U.S.C. § 1254 (1988).

The Appellate Court did not address the merits of the appeal. The only decision made by the Appellate Court, and thus the only issue presented for review, was the dismissal of petitioners' appeal.[2] Only in exceptional cases has this Court considered questions presented in a petition for certiorari that have not been considered by the appellate court. *Patrick v. Burget*, 486 U.S. 94, 99, n.5 (1988) ("This Court will usually decline to consider questions presented in a petition for certiorari that have not been considered by the lower [appellate] court."); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("Ordinarily, this Court does not resolve questions not raised or resolved in the lower court"); *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."); *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals."); see also *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957).

Exceptional circumstances do not exist in this case. Petitioners are not challenging as unconstitutional any state or federal statute, nor are they asserting any conflict among the circuits. Consequently, any reference in peti-

---

[2] The district court also dismissed petitioners' cause for want of prosecution.

tioners' brief to the alleged merits of their claim (neither the district court nor the Appellate Court reached the merits of petitioners claim) or to any district court ruling[3] is irrelevant to this appeal of the Appellate Court's dismissal.

B. THE APPELLATE COURT'S DISMISSAL OF PETITIONERS' APPEAL WAS PROPER.

Petitioners have presented an endless series of motions for stays and continuances of briefing schedules, consistently failing to brief matters in a timely fashion so as to reach the merits. In the district court, petitioners had not yet responded to the defendants' motions to dismiss, in a case which had been pending for almost 3 years at the time of that dismissal. The Appellate Court waited eight months for the petitioners to file their brief and, after repeated warnings, finally dismissed the appeal. The petitioners have appealed, moved to vacate, or sought rehearing of virtually any substantive order, and then have moved for repeated extensions of time to conduct the briefing.

An appellate court has the power to dismiss an appeal for failure to prosecute. *Link v. Wabash R.R.*, 370 U.S. 626, 629 (1962). Dismissal is proper where a party fails to follow court orders and rules. *Guam Sasaki Corporation v. Diana's, Inc.*, 881 F.2d 713 (9th Cir. 1989) (holding that the appellate court had authority to dismiss appeal for appellant's failure to comply with order which was clear on its face in requiring appellant to file brief after

[3] Because the Appellate Court did not review any of the district court's orders, those orders are not before this Court. If, as alleged, the Appellate Court dismissal was incorrect, then the proper procedure is to reverse the dismissal and remand the case back to the Appellate Court for further proceedings.

lower court proceedings concluded); *Barber v. American Sec. Bank*, 841 F.2d 1159, 1162 (D.C. Cir. 1988) ("Counsel's failure to file his brief on time and his failure to file the proper motions evidence inexcusable disregard for the rules of this court and thus warrant dismissal."); *Julien v. Zenringue*, 864 F.2d 1572 (Fed. Cir. 1989) ("failure to comply with this court's rules, including the requirements for preparing and filing briefs, appendices and other papers, may result in dismissal of an appeal for failure to prosecute").

Contrary to petitioners' assertions (*See* Petitioners' brief at p. 26), the Appellate Court has given petitioners ample time to file their brief. The brief was originally due forty days after the appeal was docketed—on October 10, 1990. After numerous extensions and stays, the brief finally became due on May 3, 1991, 205 days after it was originally due. Thus petitioners had 245 days to complete the brief, instead of the 40 days granted by the Rules of Appellate Procedure. The dismissal was hardly a surprise; the Appellate Court had warned petitioners repeatedly that failure to file a brief on the due date would result in dismissal.

A party's violation of briefing schedules and filing responsibilities is a serious matter. *Stotler and Co. v. Able*, 837 F.2d 1425, 1427 (7th Cir. 1988) ("Orders fixing the schedule for briefing an appeal must be obeyed if the business of the federal courts is to be conducted with appropriate dispatch, and we take violations of such orders seriously."). If the judicial process is to function effectively, the Appellate Court must retain the ability to control its docket and dismiss cases where an appellant fails to timely perform its duties. *See Thermocycle Int'l. Inc. v. A.F. Hinrichsen Sales Corp.*, 851 F.2d 339, 341 (Fed. Cir.

1988). Petitioners had been given approximately eight months to file their brief. The Appellate Court on three separate occasions specifically warned petitioners that their cause would be dismissed if the brief was not filed. The Court waited an additional seven days after the brief was due before dismissing the case. In light of these circumstances, the Seventh Circuit properly and responsibly dismissed petitioners' appeal for want of prosecution.

Petitioners contend that the Appellate Court failed to follow its own Circuit Rule 31(c) of the United States Court of Appeals for the Seventh Circuit. That rule provides:

> (c) *Failure of Appellant to File Brief.* When an appellant's original brief is not filed when it is due, the procedure shall be as follows:
>
> (1) All Criminal Cases in Which the Defendant Has Counsel and Civil Cases With Court-Appointed Counsel. The clerk shall enter an order directing counsel to show cause within 14 days why disciplinary action should not be taken. The court will then take appropriate action.
>
> (2) All Other Cases. *The clerk shall enter an order directing counsel, or a pro se appellant, to show cause why the appeal should not be dismissed. The court will then take appropriate action.*

(emphasis added.)

The Appellate Court was acutely aware of Circuit Rule 31(c)(2) when it dismissed petitioners' appeal. The April 25, 1991 order specifically stated:

> [O]ur reinstatement of this appeal raises a secondary question as to whether this appeal should be dismissed for want of prosecution under Circuit Rule 31(c)(2). Although the court placed briefing in

> abeyance upon the filing of the motion to dismiss, *see* order of February 8, 1991, we had previously warned appellants in our order of January 25, 1991, that this case would be dismissed for failure to prosecute if appellants did not file their brief pursuant to that order. Accordingly,
>
> IT IS FURTHER ORDERED that appellants file their opening brief and short appendix by May 3, 1991. *Failure to so file will result in the dismissal of this case pursuant to Circuit Rule 31(c)(2).* [emphasis supplied].

See Petitioners' brief at A9.

Fifteen days later, On May 10, 1991, the same panel stated:

> On April 25, 1991, we ordered appellants to file their opening brief by May 3, 1991, or face dismissal of their appeal for want of prosecution. Since that order, appellants have filed two emergency motions to abate briefing; however, they have chosen not to file a brief. The brief in this case was originally due in October 1990. We have granted several extensions of time, none of which have produced a brief. Accordingly, this appeal is DISMISSED FOR WANT OF PROSECUTION.

See Petitioners' brief at A6.

The Appellate Court gave explicit notice to petitioners that the appeal would be dismissed pursuant to Circuit Rule 31(c)(2) if they did not file a brief.

The purpose of Seventh Circuit Rule 31(c)(2) is to place the appellant on notice that its appeal may be dismissed unless it can provide a satisfactory reason for its late filing. *See Stotler and Co. v. Able*, 837 F.2d 1425 (7th Cir. 1988). In *Stotler*, the court held that an appellee's motion to dismiss is an adequate substitute for a rule to

show cause under 31(c)(2) because it notifies the appellant that its case may be dismissed. *Id.* at 1427.[4] The key to Rule 31(c)(2) is notice, not the specific procedure of a rule to show cause. The numerous court orders, warning petitioners of dismissal, was sufficient notice of the sanction for failure to file a brief. Accordingly, Circuit Rule 31(c)(2) was satisfied.

Even if one adopts petitioners' contention that Seventh Circuit Rule 31(c)(2) requires a rule to show cause proceeding, the Appellate Court's failure to invoke that process is not sufficiently material to constitute reversible error. In *Instituto Nacional v. Continental Illinois National Bank*, 858 F.2d 1264 (7th Cir. 1988), the court analyzed Seventh Circuit Rule 31(d), which, as under rule 31(c)(2), requires the clerk to enter an order to show cause (except that Rule 31(d) applies to appellee's briefs rather than appellant's briefs). In *Instituto Nacional*, the court stated that the clerk's failure to enter an order to show cause under Rule 31(d) was immaterial. *Id.* at 1271. The court then applied Rule 31(d) as if the order to show cause had been given. Certainly in the present case, the court's notice to the petitioners suffices and does not constitute material error.

---

[4] Specifically, the court stated,

> [t]he procedure in Seventh Circuit Rule 31(c)(2) for issuing a rule to show cause when a brief is not filed on time is intended for cases where no motion to dismiss has been filed and the court is acting on its own initiative . . . A motion to dismiss, as filed in this case, is an adequate substitute for a rule to show cause; it places the appellant on notice that its appeal may be dismissed unless it comes forward with grounds excusing its late filing." *Stotler* at 1427.

C. THE ISSUE RAISED BY PETITIONERS IS NOT SUFFICIENTLY IMPORTANT TO REQUIRE REVIEW BY THE SUPREME COURT.

A writ of certiorari will be granted only where there exists special and important reasons for doing so. Supreme Court Rule 10. Petitioners do not present this Court with an issue in which there is a conflict among the circuit courts or a conflict with any state court of last resort. Moreover, the United States Court of Appeals for the Seventh Circuit has not departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision under Supreme Court Rule 10.1(a).

The relevant issue in this case does not raise an important question of federal law which has not been, but should be, settled by this Court. Supreme Court rule 10.1(c). There is no constitutional question involved, and any resolution of petitioner's allegations would not contribute to the development of national law. There is simply no argument over the law and its applicability in this case. The issue before this Court is one of appellate court housekeeping. The valuable resources of the Supreme Court should not be squandered on issues of extensions of time.

CONCLUSION

The Appellate Court's dismissal of petitioners' appeal was proper and responsible in light of the numerous extensions of time granted to petitioners. The Court gave notice that dismissal would occur if a brief was not filed by the due date. This case does not raise any legal issues sufficient to warrant review by this Court. Therefore, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

LEONARD S. SHIFFLETT
Counsel of Record
CARRIE A. DURKIN
BURKE, WILSON & McILVAINE
500 West Madison Street
Suite 3700
Chicago, Illinois 60661
(312) 715-5000

Attorneys for Respondent
WILSON & MCILVAINE

(4)

Supreme Court, U.S.
FILED
JAN 6 1992
OFFICE OF THE CLERK

No. 91-756

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

FRANK L WHITMER AND JOAN P WHITMER,
Petitioners

v

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R B HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H H ROBERTSON CO., H H ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H S NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L C KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

Frank L Whitmer and Joan P Whitmer
American Citizens on their own behalf, Petitioners
221 Pardridge Place, DeKalb IL 60115, 815/758-7272

LAWtority Jan 1992

TABLE OF CONTENTS

DEFENDANTS AND THEIR ATTORNEYS CONTINUE TO ADVISE THE COURTS TO ACT AS THOUGH THESE UNITED STATES DO NOT HAVE A CONSTITUTION AND A BILL OF RIGHTS 1

Life, Liberty, Justice, Cruel and unusual punishments 2
Conflicts between the circuits 3
Plaintiffs-petitioners had won a reinstatement of their appeal after its improper dismissal upon the false representations by the defendants 3
Even a special rule in the Federal Circuit 4
Abuse of Discretion in Flagrant Violation of Due Process 4
This Appeal Is About A Life And Death Medical Emergency Where A Petitioner Was Denied Proper Time For Emergency Exploratory And Corrective Surgery Because The Court Insisted Its Schedule Took Precedence Over The Life And Health Of The Petitioner. 5
Conflict In The Circuits Not the Issue 7
Respondents' Cases Inappropriate 7
Seventh Circuit's Circuit Rule 31(c)(2) 8
Respondents' Misstatements Of Fact 9
Conclusion 10

TABLE OF AUTHORITIES

Krulewitch, 336 US 458 3

Stamler v Willis, 415 F2d 1365 (7 Cir., opinion by Circuit Judge Cummings, joined in by Chief Judge Swygert and District Judge Eschbach, August 5, 1969). 3

REFERENCES TO RESPONDENTS

"Hancock" is the brief submitted by respondents John Hancock Mutual Life Insurance Company, Sudler and Company n/k/a Sudler Marling, Inc., and General Parking Corporation.

"McIlvaine" is respondent and law firm Wilson & McIlvaine.

Respondents *L C Kohlman Inc* and *175 East Delaware Place Homeowners Association* adopted and joined in the briefs filed by the above respondents.

No. 91-756

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

FRANK L WHITMER AND JOAN P WHITMER,
Petitioners
v
JOHN HANCOCK MUTUAL LIFE INSURANCE CO.,
et al
Respondents

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

DEFENDANTS AND THEIR ATTORNEYS CONTINUE TO ADVISE THE COURTS TO ACT AS THOUGH THESE UNITED STATES DO NOT HAVE A CONSTITUTION AND A BILL OF RIGHTS

That Are To Be Zealously Guarded By Each Branch Of Government, Executive, Legislative, And Most Exceptionally By The Judicial

Defendants confuse their narrow attitudes with appellants' clearly pled Questions Presented which appellants again reiterate and adopt from pages i and ii. Particularly their Question Number Nine:

> *"Whether a cause and an appeal can be dismissed by a court where the party was denied urgent medical care supported by physicians' sworn affidavits, and the denial of the medical care caused the procedural lapse leading to the dismissal, and no hearing was held.*

Defendants' three Questions Presented do not relate at all to any of those presented by the plaintiffs-petitioners. Defendant Hancock argues *"many points . . . none of which approach the kind of important constitutional or policy questions which this court should exercise its discretion to hear."* (Page 8); *"there is no conflict among the U. S. Courts of Appeals on the question of whether the Court of Appeals can dismiss an appeal pursuant to the Federal Rules of Appellate Procedure for an appellant's failure to timely file his brief."* (Page 9); *"the U. S. Court of Appeals for the Seventh Circuit followed its own circuit rules . . . ."* (Page 11); Defendant McIlvaine argues, *"The Seventh Circuit has the authority to dismiss appellant's case for failure to comply with court orders."* (Page i).

None of the defendants' positions argue plaintiffs-petitioners' nine proper Questions Presented, and totally distort the ninth question stated above.

Life, Liberty, Justice, Cruel and unusual punishments. Actually nothing is more important to an American citizen than our Declaration of Independence and its statements that *"We hold these Truths to be self-evident, . . . that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, . . ."* Also, there is no more important constitutional question presented than plaintiffs-petitioners' rights in our constitutional mandate to *"establish Justice, . . . and secure the Blessings of Liberty to ourselves and to our Posterity, . . . judges . . . shall be bound thereby . . . "* and of course our Bill of Rights and its prohibitions, *"nor be deprived of life . . . without due process of law . . . nor cruel and unusual punishments inflicted."* (Emphasis added.)

This question touches the foundation of this Court's ultimate responsibility to enforce the mandate of the Constitution that *"the judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of*

their rights by all branches of the Government", Stamler v Willis, 415 F2d 1365 (7 Cir., opinion by Circuit Judge Cummings, joined in by Chief Judge Swygert and District Judge Eschbach, August 5, 1969).

There is an affirmative primary and absolute judicial obligation to consider the legality of the courts' sua sponte actions. Mr Justice Jackson's well known closing words in his opinion in *Krulewitch*, 336 US 458, are always appropriate. *"The most odious of all oppressions are those which mask as justice."*

Conflicts between the circuits. Plaintiffs-petitioners had not needed to plead conflicts between the circuits considering the massive constitutional violations of life and death — both of body and of lawsuit — evidenced by this cause. For as recorded, there had been no meaningful due process provided to them.

But even in the question of conflicts between the circuits, the defendants are incorrect.

Obviously the law and the constitution recognize a court's right to dismiss.
But discretionary powers are not provided to be used as a weapon, intended or not, against plaintiffs-petitioners, and both time and health itself were used against them.

Plaintiffs-petitioners had won a reinstatement of their appeal after its improper dismissal upon the false representations by the defendants. Plaintiffs-petitioners had committed no improprieties or delays and were innocent of any improper actions. Actually they had almost three weeks remaining of their prior time to file their brief. They asked for the time and were denied and denied.

Plaintiffs-petitioners were given only six days in which the United States Court of Appeals for the Seventh Circuit ordered their brief filed (in known conflict with Joan P

Whitmer's petition for writ of certiorari to this Supreme Court of the United States, 90-1809.

Even a special rule in the Federal Circuit. If defendants had really made a reasonable inquiry of the proper subject for the question presented, and any related conflicts within the circuits, they would have found (exactly as plaintiffs-petitioners had asked) that the standard legal research references to the Federal Rules of Appellate Procedure show and commend that the Federal Circuit had established such a procedural rule effective on October 15, 1986, first as Rule 13 (now Rule 31(c)).

> *"**(c) Suspension of due date**. Motions which, if granted, would terminate the appeal will suspend the due dates for briefs. When such motions are denied, briefs will be due within the balance of the time permitted in this rule, but in no case fewer than 10 days from the date of the order, unless a different due date is set forth in the order."*

Abuse of Discretion in Flagrant Violation of Due Process. The Seventh Circuit had no reason to shorten the time for briefing to two pro se petitioner-appellants right after they had won a contested reinstatement of their appeal. The court abused its discretion through an impossible and unfair scheduling to destroy plaintiffs-petitioners' cause, as well as their appeal.

Under the special circumstances that existed, the denial of time and resultant dismissal of the appeal *"for want of prosecution"* is contrary to the constitutional right to due process of law.

The Seventh Circuit abused its discretion in (1) ignoring the documented life-threatening medical condition, (2) by ordering only six short working days to file the brief following the initial reinstatement of the appeal, and by (3) intentionally scheduling it for the same date as another major filing in the Supreme Court of the United States.

Error has been confessed as far as the respondents are concerned. They all ignored completely and did not argue the violation of due process in this cause.

This Appeal Is About A Life And Death Medical Emergency Where A Petitioner Was Denied Proper Time For Emergency Exploratory And Corrective Surgery Because The Court Insisted Its Schedule Took Precedence Over The Life And Health Of The Petitioner.

The respondents and the courts conspicuously avoid mention of the documented life-threatening health condition of petitioner Frank L Whitmer which, when ignored by the courts, had become multiple abdominal perforations diagnosed as requiring emergency surgery by the Mayo Clinic and petitioner's physicians.

Other courts also had their own schedules which also required compliance.
This is all a matter of record and referred to in petitioners' petition for writ of certiorari.

What the respondents did

Respondent Wilson & McIlvaine claims (page 10) this appeal is about "*extensions of time*." This is false pleading.

The defendants initiated the first improper dismissal of this appeal by their false pleadings claiming want of jurisdiction, and petitioners' appeal was dismissed.

Petitioners filed a timely (within 14 days) petition for rehearing to protect their appeal. The Seventh Circuit states *"Petitions for rehearing are filed in many cases, usually without good reason or much chance of success. Few are granted." Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit,* 1991 edition, page 67.) *"In the relatively rare instance in which a petition for rehearing is granted, the procedure to be followed from that point forward is entirely discretionary with the court."*

The *"relatively rare instance"* occurred and the petition was granted reinstating the appeal (A8-9, Petitioner's brief). However, this was a hollow *"victory"* because of the court's ignoring the medical situation and the known conflict of filing between the Seventh Circuit and the Supreme Court of the United States on the same day, May 3, 1991.

The April 25, 1991 order vacated the court's prior dismissal. For the court **did** have jurisdiction, contrary to respondents' claims.

Prior to the issuing of that order, petitioners had asked the court to not schedule any proceedings until after a filing on May 3, 1991 in the Supreme Court of the United States. This request was denied in the April 25, 1991 order (A10, Petitioner's brief).

Petitioners again sought relief, while complying with the court's own established procedures. They asked in their emergency motion to place briefing in abeyance pending resolution of the district court's memorandum of its 60(b) inclination. This relief was denied on May 10, 1991. (A5-6, Petitioner's brief)

The court denied petitioner's May 24, 1991 petition for rehearing with suggestion for rehearing in banc. The court commented that no attempt to file a brief of appeal was made despite the *"numerous other filings."* The numerous other filings were pleas for help in handling a *"killer"* time schedule which petitioners knew they couldn't handle, and motions in an attempt to resolve the federal district court's pending 60(b) motion with the appeal, a perfectly legitimate procedure of the Seventh Circuit.

Furthermore, a brief on the merits is not written while ill and waiting for an appeal to be hopefully reinstated. Filing to vacate or for time for a procedural motion is far different than arguing substantive points of law. A full fifty page brief, citations, and short appendix is not a motion.

Conflict In The Circuits Not the Main Issue. The main thrust of respondents' brief in opposition is that there is no conflict among the United States Court of Appeals.

Again, that argument is wrong. Although petitioners never claimed there was a conflict in the circuits, there really is one. But respondents improperly dragged it in for their own purposes to divert the Court from the main issue — the gross violation of due process.

The issue is the court's failure to constitutionally adjudicate and administer their own rules. The rules are valid, and Petitioners were moving within the rules as spelled out in the Seventh Circuit's own *Handbook*.

Petitioners are not arguing that the Federal Rules of Appellate Procedure can be disregarded. To the contrary, Petitioners asked multiple times for relief, tried to follow the rules as best they could, and had legitimate, perfectly valid reasons for seeking the relief sought, namely, to have their Seventh Circuit's brief due date changed so it would not conflict with a filing in the United States Supreme Court on the same date.

Good cause was shown, exceptional circumstances existed and continue to exist, well supported by the sworn and uncontroverted medical affidavits provided the court. Petitioner's request for a very short period of time to avoid a conflict in filing dates resulted in the denial of that time.

Respondents' Cases Inappropriate. Respondents' cases cited on pages 10 and 11 are inappropriate.

D C Circuit: These petitioners complied with the rules. It was the Seventh Circuit's order they could not comply with. Petitioner's so advised the court on at least two occasions of the conflict in filing dates.

First Circuit: Petitioners' appeal was not dismissed for failure to file an adequate brief. The brief never was filed because of the time conflict, a Petitioner's

serious illness, and only six working days in which to prepare the brief. The Seventh Circuit was made aware of all of this and ignored it.

Second Circuit: In this Seventh Circuit case, the clerk was not directed to dismiss the appeal if the *"appellant failed to . . . within 30 days"*

Third Circuit: These Petitioners took all the necessary steps to prosecute their appeal, including a petition for rehearing to argue against respondents false claims of lack of jurisdiction. Their appeal was subsequently reinstated.

Fifth Circuit: The Seventh Circuit knew but ignored why Petitioners could not file their brief on the date set.

Seventh Circuit: Petitioners did not reach the point of filing a brief and had twice advised the Seventh Circuit of their conflict and situation.

Eighth Circuit: Petitioner's appeal was not dismissed for not being in compliance with the Federal Rules of Civil Procedure. Petitioners brief was not filed.

Ninth Circuit: An appellee did not move to dismiss this appeal. The court, on its own order, dismissed the appeal.

Seventh Circuit's Circuit Rule 31(c)(2). This rule does not provide for a procedure **PRIOR** to dismissal as stated by the respondents. PRIOR to does not comply with this Rule which states *"is not filed when due."*

"Filing of Briefs and Failure to Timely File Briefs.

(c) Failure of Appellant to File Brief. When an appellant's original brief is not filed when it is due, the procedure shall be as follows:

(2) All Other Cases: The Clerk shall enter an order directing counsel, or a pro se appellant, to show cause why the appeal should not be dismissed. The court will then take appropriate action."

In this case, the court acted prematurely in its dismissal of the appeal, in violation of due process.

Respondent Wilson & McIlvaine

This respondent, a law firm, states that a *"party's violation of briefing schedules and filing responsibilities is a serious matter."* (McIlvaine brief at page 6) This is a false statement — there was no ignoring or violation by petitioners. The Seventh Circuit was fully advised of the extraordinary facts and good cause which prevented petitioners from filing on the Seventh Circuit's May 3, 1991 due date.

This court is asked to take judicial notice of McIlvaine's ignoring of their own *"filing responsibilities."* Wilson & McIlvaine, when acting as counsel for Hancock, was admonished by the Illinois Appellate Court:

> *"More egregiously, counsel for defendants -- Burke, Wilson & McIlvaine and Phelan, Pope & John, Ltd. -- filed a joint brief that lacks citations to the voluminous record. (See 113 Ill.2d R. 341(e)(6), (7), 341 (f)). . . . we cannot excuse the noncompliance of two sizable and experienced law firms."*
>
> (June 29, 1990 order, page 8, 87-1211, *City of Chicago and Joan P Whitmer v John Hancock Mutual Life Insurance Company* et al.

These petitioners worked within the established rules, made the court aware of what they faced, medically, physically, and legally.

The Seventh Circuit didn't care.

Respondents' Misstatements Of Fact. Respondent Hancock's' page 3 distorts the title of Petitioner's Emergency Motion. The proper title is **"Plaintiffs' Emergency Objections to June 12, 1990 Hearing and Request for Ruling on Pending Motion for a Stay of Proceedings.**

Respondents' page 4 cites *"statutory provisions involved."* which are inapplicable to this case.

Why are respondents citing a section about filing the notice of appeal? Federal Rule of Appellate Procedure 3(a). Petitioner's filed their timely appeal, having received a proper time extension from the federal district court.

Why are respondents citing FRAP 31(c) *"an appellee may move for dismissal of the appeal . . ."* In this case, the appellee did not move for the dismissal of the appeal.

Respondents' page 5 fails to note that Petitioner's January 7, 1991 motion was to provide the court with a sworn medical affidavit in support of the time request for immediate exploratory and corrective surgery. This affidavit also provided a review of the pertinent medical facts leading up to this need for immediate exploratory and corrective surgery.

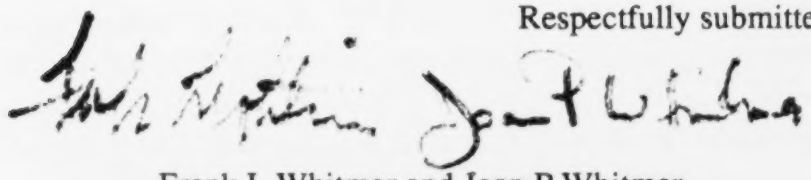
Respondents' page 5 misstates the January 10, 1991 order. The Seventh Circuit did not grant Petitioners' motion for an extension. The order reads, *"The court, on its own motion, ORDERS that briefing in this appeal will be held in abeyance pending a ruling on the pending motion for stay."* (Emphasis added.)

Conclusion. Sooner, or later, life—death—freedom—and health is exactly what liberty is all about.

Justice, due process, equal protection, and access to the courts count for something.

Petitioners ask that this Court issue its petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,



Frank L Whitmer and Joan P Whitmer
American Citizens on their own behalf, *Petitioners*
221 Pardridge Place, DeKalb IL 60115, 815/758-7272

Jan 1992